

STANDING UNDER THE GREAT LAKES
COMPACT: A BROAD-BASED ARGUMENT
INFUSED WITH PUBLIC TRUST PRINCIPLES
FOR THOSE WITH DIVERSION AVERSION

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2018 MICH. ST. L. REV. 251

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INTRODUCTION

For some, the Laurentian Great Lakes are a natural resource ripe with economic opportunity.¹ For others, they offer a seemingly limitless and increasingly desirable source of the most fundamental and sustaining human need.² For many, they are “crown jewels”³

1. See MAUDE BARLOW, *BLUE FUTURE: PROTECTING WATER FOR PEOPLE AND THE PLANET FOREVER* 67 (The New Press 2014) (“[There] is a powerful clique of decision makers, politicians, international trade and financial institutions, economic advisors and academics, and transnational corporations who view water as a commodity to be bought and sold on the open market, like running shoes.”); see also INT’L JOINT COMM’N, *PROTECTION OF THE WATERS OF THE GREAT LAKES: 2015 REVIEW OF THE RECOMMENDATIONS FROM THE FEBRUARY 2000 REPORT 4* (2015) [hereinafter *IJC 2015 Review*], http://ijc.org/files/tinymce/uploaded/Publications/IJC_2015_Review_of_the_Recommendations_of_the_PWGL_January_2016.pdf [<https://perma.cc/372L-MG77>] (“In 1998, . . . a Canadian entrepreneur proposed to ship Lake Superior water to Asia by marine tanker.”).

2. See *Great Lakes Facts and Figures*, LAKE ERIE WATERKEEPER, <http://www.lakeeriewaterkeeper.org/lake-erie/great-lakes/> [<https://perma.cc/H7C2-SMHQ>] (last visited Apr. 9, 2018) (noting that the Great Lakes contain “6 quadrillion gallons of freshwater; one-fifth of the world’s fresh surface water (only the polar ice caps and Lake Baikal in Siberia contain more); 95 percent of the U.S. supply; [and] 84 percent of the surface water supply in North America” and that if “[s]pread evenly across the continental U.S., the Great Lakes would submerge the country under about 9.5 feet of water”); see also SHARING WATER IN TIMES OF SCARCITY: GUIDELINES AND PROCEDURES IN THE DEVELOPMENT OF EFFECTIVE

warranting the utmost preservation to ensure that they are stringently protected in accordance with public trust principles for generations to come.⁴ With this varying range and degree of perspectives,⁵ a clash over how to best manage, utilize, and safeguard the Great Lakes ecosystem is inevitable.⁶ Perplexing circumstances such as climate change, environmental degradation, and water shortages are all contributing to unprecedented confrontation over this indispensable component of the world's surface freshwater supply.⁷ Moreover, the

AGREEMENTS TO SHARE WATER ACROSS POLITICAL BOUNDARIES 2 (Stephen E. Draper ed., 2006) ("Water is central to survival of life itself, and without it plant and animal life would be impossible. Water is a central component of the Earth system, providing important controls on the world's weather and climate. Water is also central to our economic well being.") (citing Charles J. Vörösmarty, *Global Water Assessment and Potential Contributions from Earth Systems Science*, 64 *AQUATIC SCI.* 328, 328-51 (2002)); James Olson, *All Aboard: Navigating the Course for Universal Adoption of the Public Trust Doctrine*, 15 *VT. J. ENVTL. L.* 135, 140 (2014) ("The freshwater seas of North America, the five Great Lakes and their connecting and tributary waters and ecosystems, represent nearly twenty percent of the world's fresh surface water and are home to 35 million people spread over eight states and two provinces.").

3. Russell A. Moll et al., *The Great Lakes: An Overview of Their Formation, Geology, Physics, and Chemistry*, in *GREAT LAKES FISHERIES POLICY AND MANAGEMENT: A BINATIONAL PERSPECTIVE* 3 (William W. Taylor, Abigail J. Lynch & Nancy J. Leonard eds., 2d ed. 2013) ("The Laurentian Great Lakes are the crown jewels of the freshwater systems of North America.").

4. See BARLOW, *supra* note 1, at 67 ("They see water as a common heritage and a public trust to be conserved and managed for the public good."); see also Olson, *supra* note 2, at 150 ("[T]he Great Lakes . . . are held in trust by the state for the benefit of the public.").

5. See Noah D. Hall & Benjamin C. Houston, *Law and Governance of the Great Lakes*, 63 *DEPAUL L. REV.* 723, 724 (2014) ("There is . . . no single human view towards the 'environment,' but rather a wide range of values that vary by individual, time, place, and the environmental decision at issue.").

6. See *id.* at 725 (asserting that "[t]he diversity of values and interests in the Great Lakes creates a tremendous challenge when using law and governance to address emerging environmental issues"); see also James M. Olson, *Great Lakes Water*, *MICH. B.J.*, Dec. 2001, at 33 ("With global water demand doubling every 20 years, states, countries, and private companies understandably covet the Great Lakes.").

7. See Hall & Houston, *supra* note 5, at 725 ("The Great Lakes are beset by pollution from industry, afflicted by eutrophication due to agricultural fertilizers, invaded repeatedly by nonnative species, threatened by climate change, and eyed by more arid regions for diversions to ease water shortages in other areas of the country."); see also Olson, *supra* note 2, at 142-43 ("[T]he Great Lakes basin and its ecosystem are in ecological crisis and face many challenges. These include a rapidly increasing demand and competition for freshwater; continuing influxes of invasive species such as quagga mussels; dead zones; loss of fish populations; climate change; increasing energy and food demands; and increasing demand for drinking

tension between balancing economic rights, human rights, and preservation interests is becoming all the more apparent.⁸

June 21, 2016, was the apex of a thirteen-year clash over these interests as the governors of all eight Great Lakes states unanimously approved the City of Waukesha, Wisconsin's application to divert water from Lake Michigan.⁹ This historical decision "mark[ed] the first test case of the Great Lakes Compact,"¹⁰ which expressly prohibits the diversion of water from the Great Lakes to places located outside the Great Lakes Basin.¹¹ The Great Lakes-St. Lawrence River Basin Water Resources Compact (Great Lakes Compact) does leave room for exceptions to this nearly universal ban,¹² specifically for those counties "that straddle the hydrological

water. Although the governments and inhabitants have confronted many challenges to the Great Lakes, the Great Lakes commons have never been so threatened by so many potential losses, harms, or risks[] of such systemic or overwhelming magnitude."); Letter from James M. Olson, President and Policy Advisor, FLOW (For Love of Water) to Great Lakes-St. Lawrence River Water Resources Regional Body and Water Resources Council 13 (Mar. 1, 2016) [hereinafter Comments on the Waukesha Diversion Application], <http://flowforwater.org/wp-content/uploads/2016/09/FINAL-Waukesha-Regional-Body-Comments-3-01-16.pdf> [<https://perma.cc/MSK3-67XP>] (noting how "[i]n this second decade of the 21st century, it is more evident than ever that the Great Lakes face unprecedented geopolitical and systemic threats").

8. See Hall & Houston, *supra* note 5, at 724-25 (noting that "[t]o best understand the laws and governance of the Great Lakes, one must be objective in recognizing the diversity of values, interests, and priorities at play and acknowledge the fallacy of a single 'best' solution for everyone").

9. See Don Behm, *Great Lakes Governors Approve Waukesha Water Request*, MILWAUKEE J. SENTINEL (June 21, 2016), <http://archive.jsonline.com/news/waukesha/decision-day-arrives-for-waukeshas-lake-michigan-water-request-b99747111z1-383762921.html> [<https://perma.cc/2CQD-TCJ5>] ("On a historic 8-0 vote, Waukesha won the water prize it sought for 13 years.").

10. Keith Matheny, *Waukesha Gets Permission to Draw Water from Lake Michigan*, DETROIT FREE PRESS (June 21, 2016, 7:52 PM), <http://www.freep.com/story/news/local/michigan/2016/06/21/waukesha-gets-permission-draw-water-lake-michigan/86187378/> [<https://perma.cc/B3Y4-52TX>].

11. See Codi Kozacek, *Waukesha Great Lakes Diversion Approved*, CIRCLE BLUE (June 21, 2016), <http://www.circleofblue.org/2016/great-lakes/waukesha-great-lakes-diversion-approved/> [<https://perma.cc/GS9F-67SF>]; see also A. Dan Tarlock, *The International Joint Commission and Great Lakes Diversions: Indirectly Extending the Reach of the Boundary Waters Treaty*, 54 WAYNE L. REV. 1671, 1672-73 (2008). Canada also has its own strict anti-diversion legislation. *Id.* at 1673. It enacted a strict federal anti-diversion law in 2002. *Id.*

12. See A. Dan Tarlock, *Four Challenges for International Water Law*, 23 TUL. ENVTL. L.J. 369, 392 (2010) (noting that communities falling into the exception category "must satisfy strict standards to access water"); see also Tarlock, *supra* note 11, at 1673 ("Even small communities that straddle the divide between the

divide between the Great Lakes and other watersheds.”¹³ It is directly because of this straddling county exception that the Compact Council even considered the City of Waukesha’s diversion proposal in the first place.¹⁴ The City of Waukesha lies seventeen miles west of Lake Michigan in the Mississippi River Watershed,¹⁵ and it desperately needed an alternative water supply for its 70,000-member community because its current primary source is a radium-contaminated and depleted sandstone aquifer.¹⁶ After numerous scientific studies and extensive analyses, the City concluded that Lake Michigan water was the only viable alternative source.¹⁷ Consequently, the governors acted pursuant to their authority under the Compact and decided to allow the diversion of a maximum of 8.2 million gallons of water per day.¹⁸

Given the monumental significance of this decision and the contested debates that persisted throughout the application process, it is unsurprising that one challenge to the Waukesha Diversion quickly ensued.¹⁹ On September 16, 2016, the Great Lakes and St. Lawrence Cities Initiative (Cities Initiative), a nonprofit organization composed of over 120 mayors from United States and Canadian cities, sought a hearing to formally contest the Compact Council’s approval of the diversion.²⁰ Because the key first step to pursuing potential objections is a party’s ability to establish standing under the

Great Lakes and other drainages, which often includes a small part of a state, must meet a high standard to gain access to water located only a few miles away.”).

13. Kozacek, *supra* note 11.

14. *See id.*

15. *See* Evan Garcia & Paris Schutz, *Unanimous Vote Gives Waukesha Access to Lake Michigan Drinking Water*, CHI. TONIGHT (June 21, 2016, 3:22 PM), <http://chicagotonight.wttw.com/2016/06/21/unanimous-vote-gives-waukesha-access-lake-michigan-drinking-water> [<https://perma.cc/BSX4-JA2V>] (noting that Waukesha is located about seventeen miles west of Lake Michigan).

16. *See* Matheny, *supra* note 10.

17. *See* Kozacek, *supra* note 11.

18. *See* Behm, *supra* note 9.

19. *See* Garret Ellison, *Great Lakes Mayors Plan Legal Challenge to Waukesha Water Approval*, MLIVE.COM (Aug. 26, 2016, 10:07 AM), http://www.mlive.com/news/index.ssf/2016/08/great_lakes_mayors_plan_legal.html [<https://perma.cc/SR3E-L4B3>] (“An international group of Great Lakes and St. Lawrence River mayors . . . request[ed] a formal hearing to challenge the recent decision to allow a Wisconsin city access to Lake Michigan as a source for drinking water.”).

20. *See generally* Written Statement in Furtherance of Request for Hearing and Compact Council Consideration, Case No. 2016-1 [hereinafter Cities Initiative Written Statement], <https://glsccities.org/wp-content/uploads/2015/11/Cities-Initiative-Written-Statement-9-16-16.pdf> [<https://perma.cc/2HC2-8B98>].

“aggrieved person” standard in the Great Lakes Compact,²¹ both the Cities Initiative and the City of Waukesha extensively litigated this issue in their briefs and at oral argument.²² However, in its written opinion, the Compact Council consciously bypassed answering this threshold inquiry and proceeded to the merits of the Cities Initiative’s request, ultimately declining to reopen or modify its final decision.²³ Though the Cities Initiative could have further appealed the matter and sought judicial review, it reached a settlement with the Compact Council, foreclosing the opportunity not only for review of its challenge, but also for a reviewing court to establish precedent on what it means to be “aggrieved” in this context.²⁴ Consequently, the issue of who qualifies as “aggrieved” under the

21. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 7.3, 122 Stat. 3739, 3761 (2008).

22. See Cities Initiative Written Statement, *supra* note 20, at 13–14 (containing the Cities Initiative initial standing argument); Supplement to Written Statement in Furtherance of Request for Hearing and Compact Council Consideration at 3–11, Case No. 2016-1 [hereinafter Cities Initiative Supplement to Written Statement], <https://glsclcities.org/wp-content/uploads/2015/11/12-19-16-Supplement-to-Cities-Initiative-Written-Submission-FIN.pdf> [<https://perma.cc/7J3P-95M3>] (building upon the standing arguments raised in its Written Statement); Great Lakes and St. Lawrence Cities Initiative’s Reply to City of Waukesha’s Response to the Cities Initiative’s Request for a Hearing at 5–12, Case No. 2016-1 [hereinafter Cities Initiative Reply], <http://greatwateralliance.com/wp-content/uploads/2017/02/2-6-17-cities-initiative-reply.pdf> [<https://perma.cc/L8NG-U3MA>] (responding to the City of Waukesha’s standing arguments); see also City of Waukesha’s Response to the Cities Initiative’s Request for a Hearing at 6–15, Case No. 2016-1 [hereinafter City of Waukesha’s Response], <http://greatwateralliance.com/wp-content/uploads/2017/02/1-23-17-city-of-waukesha-response.pdf> [<https://perma.cc/F2FE-UUNT>] (containing the City of Waukesha’s standing objections).

23. See *In re City of Waukesha*, Diversion Hearing No. 2016-1 (May 4, 2017) at 10, 51 [hereinafter *In re City of Waukesha*], <http://www.glscompactcouncil.org/Docs/Waukesha/Compact%20Council%20Opinion%20on%20GLSLCI%20Request%20for%20Hearing%205-4-17.pdf> [<https://perma.cc/CC6C-WLZT>] (noting how the Compact Council addressed the merits “without fully resolving whether the Cities Initiative is a ‘Person aggrieved’ and thereby entitled to a hearing” and how it found that the Cities Initiative did not meet its burden to “warrant[] opening or modifying” the decision).

24. See Andrew Weiland, *Great Lakes Cities Initiative Drops Challenge to Waukesha Water Diversion*, MILWAUKEE BUS. NEWS (Aug. 2, 2017, 4:27 PM), <https://www.biztimes.com/2017/industries/energy-environment/great-lakes-cities-initiative-drops-challenge-to-waukesha-water-diversion/> [<https://perma.cc/25LP-KV6Y>] (“The Great Lakes and St. Lawrence Cities Initiative announced Wednesday that it is settling its challenge to the city of Waukesha’s plans to tap Lake Michigan water.”).

Great Lakes Compact remains unresolved and subject to future debate.²⁵

This Comment seeks to explore the issue of standing under the Great Lakes Compact through challenges to the Waukesha Diversion.²⁶ It highlights the public trust doctrine²⁷ as an overarching principle that has been a cornerstone of Great Lakes management before looking in-depth at the Great Lakes Compact as a tool of interstate governance.²⁸ It further examines the fundamentals of standing and specific interpretations of who can be classified as an aggrieved person,²⁹ as well as the Waukesha Diversion's approval and the Cities Initiative's challenge.³⁰ Ultimately, it argues that given the gravity of the decision, the value of the Great Lakes Basin and ecosystem, and the potential for long-term, irreversible ramifications, the Compact Council and reviewing courts should interpret the aggrieved person standard broadly in this context so as not to preclude and unduly limit review of the Waukesha Diversion approval.³¹ Furthermore, core principles emanating from the public trust doctrine should inform the standing analysis to best effectuate the Compact's overall purpose—protecting the Great Lakes in perpetuity for generations to come.³²

Part I of this Comment provides background on Great Lakes governance, beginning with a brief overview of the public trust

25. See Gary Wilson, *Great Lakes Mayors Drop Legal Threat on Waukesha Diversion*, GREAT LAKES NOW (Aug. 3, 2017), <https://www.greatlakesnow.org/2017/08/great-lakes-mayors-drop-legal-threat-waukesha-diversion/> [https://perma.cc/LBT7-AYM6] (noting how the decision to settle is “an action with long term implications”).

26. See CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* 35 (3d ed. 2010) (“Standing, broadly understood, is the authority of someone to initiate an action.”).

27. See Stephen E. Roady, *The Public Trust Doctrine*, in *OCEAN AND COASTAL LAW AND POLICY* 43 (Donald C. Baur et al. eds., 2d ed. 2015) (“The Public Trust Doctrine springs from ancient law concepts that treated certain lands and waters as belonging to the public for public benefit.”).

28. See generally *infra* Part I (describing the public trust doctrine and its recognition in the Great Lakes states and charting the history of Great Lakes governance leading up to the Great Lakes Compact).

29. See generally *infra* Part II (discussing the standing doctrine and highlighting cases interpreting the aggrieved person standard).

30. See generally *infra* Part III (examining the Waukesha Diversion Application, its approval, and the Cities Initiative's challenge).

31. See *infra* Part IV.

32. See *infra* Part IV; see also Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 1.3(1)(f), 122 Stat. 3739, 3742–43 (2008).

doctrine and its established presence in the Great Lakes states, followed by a discussion of some key historical developments in their management.³³ It then shifts to specifically examine the Great Lakes–St. Lawrence River Basin Water Resources Compact, first providing an overview of interstate compacts as a mechanism for managing complex issues and then culminating in an in-depth look at the Compact, its purpose, and its pertinent provisions.³⁴ Part II provides an overview of standing and the aggrieved person standard, focusing specifically on its interpretations as it relates to environmental issues.³⁵ Part III delves into the Waukesha Diversion, including the underlying facts, and looks at the process from the plan’s inception to its approval.³⁶ It also explores the arguments both opponents and proponents presented, including the governors’ rationales underlying their unanimous decision.³⁷ Further, it documents the first challenge to the Waukesha Diversion brought forth by the Cities Initiative, focusing specifically on how the Compact Council expressly declined to rule on the issue of standing, therefore leaving the interpretation of the Compact’s “aggrieved person” provision unresolved.³⁸ Finally, Part IV analyzes standing under the Great Lakes Compact and how both the Compact Council and reviewing courts should interpret the aggrieved person standard broadly in light of core public trust principles when considering the establishment of standing in challenges to the Waukesha Diversion.³⁹

I. GREAT LAKES GOVERNANCE: CONNECTING THE PUBLIC TRUST DOCTRINE, PAST MANAGEMENT ENDEAVORS, AND THE GREAT LAKES COMPACT

It should come as no surprise that a colossal resource constituting one-fifth of the world’s water supply involves a highly complex system of governance.⁴⁰ Moreover, because the Great Lakes incorporate international, national, local, and tribal stakeholders, they

33. *See infra* Part I.

34. *See infra* Part I.

35. *See infra* Part II.

36. *See infra* Part III.

37. *See infra* Part III.

38. *See infra* Part III.

39. *See infra* Part IV.

40. *See* Hall & Houston, *supra* note 5, at 723 (“The enormity of the Great Lakes is matched by a governance and legal regime that can overwhelm attorneys and policymakers.”).

necessitate intricate management.⁴¹ A brief overview of the public trust doctrine and its entrenchment in the eight Great Lakes states illustrates how its core principles have been a mainstay in the evolving governing framework.⁴² Furthermore, an examination of the key developments in Great Lakes governance demonstrates how the progressive management endeavors reflect the influence of public trust principles and the ever-increasing recognition of the waters' value.⁴³ Cognizant of this background, the ultimate proposal and ratification of the Great Lakes–St. Lawrence River Basin Water Resources Compact signified a monumental effort to shift from a system of “patchwork”⁴⁴ governance to one of legally enforceable interstate management.⁴⁵

A. The Public Doctrine: Anchoring Protection of Great Lakes Waters

The public trust doctrine is an ancient principle that has been a fixture of American property law since this nation's inception.⁴⁶ At its core, the doctrine mandates that “public trust lands, waters and living resources in a State are held by the State in trust for the benefit of all [its] people, and establishes the right of the public to fully enjoy public trust lands, waters and living resources for a wide variety of recognized public uses.”⁴⁷ Though the exact scope and

41. See *id.* (“The system is shared and governed by two countries, eight states, two provinces, and numerous Indian tribes and First Nations, in addition to a multitude of American, Canadian, and international agencies, as well as thousands of local governments.”).

42. See discussion *infra* Section I.A (describing the public trust doctrine and its recognition in the Great Lakes states); see also Olson, *supra* note 2, at 151, 164 (asserting that “virtually all eight Great Lakes states have adopted the public trust doctrine for the Great Lakes and navigable lakes and streams” and “[t]he principles of public trust have been historically recognized in Canada”).

43. See discussion *infra* Section I.B (charting the history of Great Lakes governance).

44. See Hall & Houston, *supra* note 5, at 723-24 (“This ‘patchwork’ of Great Lakes governance has achieved mixed success, as the stressors affecting the Lakes have grown more pronounced.”).

45. See Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405, 406 (2006). The Great Lakes–St. Lawrence River Basin Water Resources Compact and its accompanying Agreement provide a new comprehensive mechanism with legal teeth to manage the Great Lakes. See *id.*

46. See Olson, *supra* note 2, at 145-47.

47. DAVID C. SLADE ET AL., PUTTING THE PUBLIC TRUST DOCTRINE TO WORK: THE APPLICATION OF THE PUBLIC TRUST DOCTRINE TO THE MANAGEMENT OF LANDS, WATERS AND LIVING RESOURCES OF THE COASTAL STATES 3 (1990).

application of the public trust doctrine varies from state to state, its underlying principles apply to the waters of the Great Lakes and have correspondingly influenced the history of their management.⁴⁸

1. *The Origin of the Public Trust Doctrine and Its Basic Principles*

The origins of the public trust doctrine trace back to the Roman empire in the sixth century⁴⁹ when the Institutes of Justinian, a codification of Roman civil law, formally acknowledged the public nature of certain natural resources and declared that “[b]y the law of nature these things are common to mankind—the air, running water, the sea, and consequently the shores of the sea.”⁵⁰ This landmark decree later influenced the developing law of Western Europe and especially took root in English common law, as it was explicitly adopted in the Magna Carta.⁵¹ The basic notion was that the crown held certain common resources, “like moving water,”⁵² in trust for

48. See Olson, *supra* note 2, at 148 (“[W]hile the scope or standards of the public trust may vary from state to state, all recognize and follow [the] principle that protects the rights of the public to use navigable waters for navigation, boating, and fishing.”); see also *id.* at 150 (“[F]oundational principles of the doctrine are applied in most every state: the Great Lakes, and other navigable waters, are held in trust by the state for the benefit of the public.”).

49. See Roady, *supra* note 27, at 44. According to Roady, the Romans most likely adopted the public trust doctrine’s underlying principles from the ancient Greeks. *Id.*

50. Kenneth K. Kilbert, *The Public Trust Doctrine and the Great Lakes Shores*, 58 CLEVELAND ST. L. REV. 1, 4 (2010) (citations omitted) (quoting INSTITUTES OF JUSTINIAN § 2.1.1, at 90 (Thomas Collett Sandars trans., 7th ed. 1922)); see also SLADE ET AL., *supra* note 47, at 1 (“The Institutes of Justinian remain the touchstone of today’s Public Trust Doctrine.”).

51. See SLADE ET AL., *supra* note 47, at 5 (“Roman civil law eventually influenced the jurisprudence of all Western European nations.”); see also Kilbert, *supra* note 50, at 4 (“English common law similarly recognized the importance of maintaining navigable waters and the lands underlying them for common use. Control over navigable waters and the lands underlying them was considered an essential element of sovereignty, and therefore lands underlying navigable waters were owned by the crown in trust for use by the people.”); Olson, *supra* note 2, at 146 (“This principle passed down into English common law through the Magna Carta.”). The underlying principles of the public trust doctrine also appeared in the writings of Henry de Bracton during the thirteenth century, which “reiterated the Justinian notion that certain resources were common to the public.” Roady, *supra* note 27, at 44.

52. See Olson, *supra* note 2, at 146 (“Common natural resources, like moving water, were understood to be held by government for the benefit of the

the benefit of the public and therefore had a corresponding duty as trustee to protect the public's right to use these resources in perpetuity.⁵³ Thus, this responsibility was one that could not be abdicated.⁵⁴

Through the colonization of North America, English common law public trust principles became a part of the governance framework of the thirteen original colonies⁵⁵ and ultimately that of the United States.⁵⁶ With the Northwest Ordinance of 1787, the newly formed American government expanded the public trust doctrine's scope to include fresh waters, explicitly holding that "the Mississippi and St. Lawrence Rivers [were] 'common highways, and for ever free.'"⁵⁷ Following this decree, the public trust doctrine

people, imposing upon the government a responsibility to safeguard the public's free use of these natural commons.").

53. See *id.* at 146-47 ("Under English common law, the sea, the soil under the sea and over which the sea ebbed and flowed, and the seashore between the low and high water marks, was held by the Crown; but it was considered to be held in trust for the protection of the public's uses of these waters and as common property.").

54. See *id.* at 147 ("Neither the Crown nor private persons could interfere with or alienate the natural and fundamental right of the public to use navigable waters and their foreshore for public uses, including navigation, boating, or fishing."); see also Kilbert, *supra* note 50, at 4 ("While legal title to the lands under navigable waters (*jus privatum*) could be transferred by the crown to a private party, the crown would continue to hold the public's interest in using the lands (*jus publicum*) in trust for the people. Thus, notwithstanding private ownership of lands underlying navigable waters, the government retained its trust obligation, and the public would continue to have the rights to make use of navigable waters and underlying lands.").

55. See JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 5 (1994). The first official recognition of the doctrine was in the Massachusetts Bay Colony's Ordinances of 1641 and 1647, which "foreshadowed its thrust in American law over the following three centuries." *Id.*; see also Roady, *supra* note 27, at 45 ("In broad terms, . . . the original colonies carried the basic elements of the Public Trust Doctrine concept forward when they established the United States.").

56. See Kilbert, *supra* note 50, at 4 ("The United States inherited the public trust doctrine from English common law."); see also Olson, *supra* note 2, at 147 ("When the colonies won independence from England, ownership and control over navigable waters, shores, and common natural resources, like air and wildlife, vested in each of the sovereign states for the benefit of their citizens.").

57. ARCHER ET AL., *supra* note 55, at 6 (quoting The Northwest Ordinance of 1787, 1 Stat. 50 (1789)). "A century and a half later, with the Northwest Ordinance, the newly formed United States government adopted public trust principles to apply to its great internal waterways." *Id.* The Northwest Ordinance also established the Equal Footing Doctrine, which mandated that "each state has complete power over its public trust lands, subject only to the federal government's

continued to develop in American jurisprudence through a series of Supreme Court cases, the “lodestar” being *Illinois Central Railroad Co. v. Illinois*, which expressly applied the doctrine to the Great Lakes.⁵⁸ Though application of the doctrine has varied since the Court decided *Illinois Central Railroad*, the core principles it articulated remain unchanged, and the doctrine “has been recognized across the nation, including in all of the Great Lakes states.”⁵⁹

2. *The Public Trust Doctrine in the Great Lakes States*

Each of the eight Great Lakes states—Wisconsin, Michigan, Minnesota, Ohio, Indiana, New York, Illinois, and Pennsylvania—have recognized the public trust doctrine and incorporated its core principles into their legal frameworks.⁶⁰ Though their specific approaches vary in degree, they have signified a common commitment to protecting their navigable waters and public trust resources through a combination of constitutional provisions, statutory enactments, and state court decisions.⁶¹ Wisconsin’s public trust doctrine, for instance, “is ‘rooted in’” its constitutional provision that nearly mirrors the language of the Northwest

supreme power under the United States Constitution’s commerce, navigation, and treaty powers.” *Id.* at 9.

58. See Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 436-37, 459 (1892); see also Kilbert, *supra* note 50, at 5 (“The U.S. Supreme Court’s decision in *Illinois Central Railroad Co. v. Illinois* is often referred to as the ‘lodestar’ of American public trust law.”); Olson, *supra* note 2, at 148 (“In the seminal case of *Illinois Central Railroad Co. v. Illinois*, the United States Supreme Court affirmed the foundational nature of the public trust doctrine and its applicability to the Great Lakes and navigable waters.”).

59. Kilbert, *supra* note 50, at 5-6 (“[A]t its core, the public trust doctrine teaches that each state holds the navigable waters and lands underlying them in trust for use by the public for certain protected uses, traditionally navigation, fishing, and commerce. Not only does the public trust doctrine afford certain rights to the public, it imposes certain responsibilities on the state to protect the public’s rights to use those waters and underlying lands. The public trust doctrine can be employed to invalidate or stop both governmental and private actions that violate the doctrine.”); see also Olson, *supra* note 2, at 151 (“These principles have remained constant and flourished over time in the states, including all of the Great Lakes states.”).

60. See Olson, *supra* note 2, at 151.

61. See *id.* at 151-52 (“The constitutions or laws of several of the states have recognized a public trust in navigable waters or public natural resources.”); see also *id.* at 152-64 (summarizing “each of the Great Lakes states’ statutory, constitutional, and/or jurisprudential recognition of the public trust doctrine”).

Ordinance.⁶² The Wisconsin legislature has also enacted several statutes that expressly dictate the doctrine's scope and application, and its contours have developed through state court decisions.⁶³ Similarly, Michigan's public trust doctrine is implicitly recognized in its Constitution, and statutes, such as its Natural Resources and Environmental Protection Act, directly assert that the state has an obligation to protect the integrity of its waters for future generations.⁶⁴ The state's highest court has also repeatedly affirmed the state's public trust duty.⁶⁵ Like in Wisconsin, Minnesota's Constitution declares that its navigable waters "shall be . . . forever free to citizens," and its legislature has enacted several statutes that empower the public trust doctrine.⁶⁶ The Minnesota Supreme Court has also directly held that the state's public trust principles encompass Lake Superior.⁶⁷

Ohio's judicial system has likewise emphasized its recognition of the public trust doctrine and its particular applicability to Lake Erie, as has the state legislature in its Coastal Management statute.⁶⁸

62. *Id.* at 162 (quoting *Hilton ex rel. Pages Homeowners' Ass'n v. Dep't of Nat. Res.*, 717 N.W.2d 166, 173 (Wis. 2006)); *see also* WIS. CONST. art. IX, § 1.

63. *See* Olson, *supra* note 2, at 164 ("The state also has a number of statutory provisions recognizing the importance of the public trust doctrine, and governing its application with respect to public trust resources in Wisconsin."); *see also id.* at 163 ("The courts have developed a number of core public trust standards.").

64. *See id.* at 155; *see also* MICH. CONST. art. IV, § 52 ("The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people."); MICH. COMP. LAWS § 324.32702(1)(c) (1994) ("The waters of the state are valuable public natural resources held in trust by the state, and the state has a duty as trustee to manage its waters effectively for the use and enjoyment of present and future residents and for the protection of the environment.").

65. *See, e.g.,* *Obrecht v. Nat'l Gypsum Co.*, 105 N.W.2d 143, 149 (Mich. 1960) ("This Court, equally with the legislative and executive departments, is one of the sworn guardians of Michigan's duty and responsibility as trustee of the . . . five Great Lakes."); *see also* Olson, *supra* note 2, at 156-57 (discussing Michigan case law).

66. MINN. CONST. art. II, § 2; *see also* Olson, *supra* note 2, at 158 ("Minnesota declares that its air, water, and natural resources and 'the public trust' in those resources are protected from 'pollution, impairment or destruction.'") (quoting MINN. STAT. § 116.B.03 (2009)).

67. *See* Olson, *supra* note 2, at 157 ("The Minnesota Supreme Court has recognized the public trust doctrine in its navigable waters, including Lake Superior.") (citing *Nelson v. De Long*, 7 N.W.2d 342, 346 (Minn. 1942)).

68. *See id.* at 160 (quoting *Thomas v. Sanders*, 413 N.E.2d 1224, 1228 (Ohio Ct. App. 1979)); *see also* OHIO REV. CODE ANN. § 1506.10 (West 1989) ("It is hereby declared that the waters of Lake Erie consisting of the territory within the

In Indiana, state courts have expressly held that the public trust doctrine applies to Lake Michigan,⁶⁹ and its legislature has also codified the doctrine and its core principles into law, declaring that the public has “a vested right” in protecting the integrity of the freshwater lakes within the state’s borders.⁷⁰ Comparably, various New York statutes and state court decisions also recognize public trust principles and enshrine its citizens’ rights under them.⁷¹ Finally, Illinois and Pennsylvania each have express provisions in their constitutions establishing the public trust doctrine’s presence in their governing frameworks,⁷² and their legislatures have enacted statutes to execute its principles.⁷³ Given the entrenchment of the public trust doctrine in each of the Great Lakes states, it is unsurprising that elemental facts of the doctrine have played a role in Great Lakes management endeavors.⁷⁴

B. Great Lakes Governance: An Evolving Path of Progress

The Great Lakes are a prized treasure, and the history of progressive management efforts leading up to the ratification of the

boundaries of the state . . . together with the soil beneath and their contents, do now belong and have always, since the organization of the state of Ohio, belonged to the state as proprietor in trust for the people of the state.”). “Ohio has no constitutional public trust declaration . . .” Olson, *supra* note 2, at 160.

69. See Olson, *supra* note 2, at 153-54.

70. IND. CODE § 14-26-2-5(c) (2003). See Olson, *supra* note 2, at 154 (“In 1955 the Indiana Legislature adopted the public trust into law, stating that the waters ‘in a natural stream, natural lake, or other natural body of water in Indiana that may be applied to a useful or beneficial purpose is declared to be a natural resource and public water of Indiana.’”) (quoting IND. CODE § 14-25-1(2) (1995)).

71. See *Adirondack League Club Inc. v. Sierra Club*, 615 N.Y.S.2d 788, 792 (1994) (illustrating an application of public trust principles); Olson, *supra* note 2, at 159 n.107 (listing other references to the public trust doctrine in New York law).

72. See ILL. CONST. art. XI, § 1 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”); PA. CONST. art. I, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”).

73. See Olson, *supra* note 2, at 153 n.66-67 (listing the several Illinois statutes, including ones that regulate the Great Lakes); see also *id.* at 161 (noting that because Pennsylvania’s public trust declaration in its Constitution is not “self-executing,” the state legislature has implemented laws to implement it).

74. See *id.* at 151.

Great Lakes–St. Lawrence River Basin Water Resources Compact reflects this notion.⁷⁵ Thus, addressing the key developments in Great Lakes management fosters understanding and corresponding appreciation for the current state and complexity characterizing their governance framework.⁷⁶ The pivotal developments in the evolution of this body of law include the Boundary Waters Treaty of 1909, the Great Lakes Charter of 1985, the Water Resources Development Act of 1986, and the Great Lakes Charter Annex of 2001.⁷⁷ When enacted, each of these advancements constituted a deliberate step forward to improve Great Lakes protection.⁷⁸

1. The Boundary Waters Treaty of 1909

The Boundary Waters Treaty signified the start of formal efforts to protect the Great Lakes.⁷⁹ Signed by both the United States and Canada, it created the International Joint Commission to help manage activities that might impact the waters lying between the two nations' borders.⁸⁰ While it did establish a general prohibition on water diversions from the Great Lakes, the ban ultimately only extended to surface waters.⁸¹ Thus, requests for diversions could be approved only if they did not "affect[] the 'natural flow or level' of the lake on the other side of the boundary."⁸² Another significant

75. See Jessica A. Bielecki, *Managing Resources with Interstate Compacts: A Perspective from the Great Lakes*, 14 BUFF. ENVTL. L.J. 173, 174-75 (2007) ("The American and Canadian governments have recognized the value and importance of the Great Lakes and have been working together for years in an effort to protect this multi-jurisdictional, complex resource.").

76. See *id.* at 176 ("Similar to the Great Lakes ecosystem, the layers and levels of political and legal institutions overlying the natural basin are complex and diverse. Two federal governments, eight states, two provinces, and a list of American, Canadian and international agencies operate within the Basin. In addition, there are millions of private actors including industry representatives, environmentalists and residents. The difficulty in establishing an effective, basin-wide water quantity management system is coordinating all these stakeholders.").

77. See *infra* Subsections I.B.1-4.

78. See *id.*

79. See Bielecki, *supra* note 75, at 177; see also Joseph W. Dellapenna, *International Law's Lessons for the Law of the Lakes*, 40 U. MICH. J.L. REFORM 747, 748 (2007) ("The Boundary Waters Treaty . . . is the beginning of what might be called the 'law of the lakes.'").

80. See Dellapenna, *supra* note 79, at 748.

81. See Olson, *supra* note 6, at 35.

82. Melissa K. Scanlan, Jodi H. Sinykin & James Krohelski, *Realizing the Promise of the Great Lakes Compact: A Policy Analysis for State Implementation*, 8 VT. J. ENVTL. L. 39, 50 (2006); see also Treaty Between the United States and Great

shortcoming of this Treaty was that it did not encompass Lake Michigan or its connecting lakes and tributaries.⁸³

The lengthy battle between Illinois and the other Great Lakes states illustrates this particular flaw.⁸⁴ Beginning at the end of the nineteenth century, the City of Chicago experienced a population boom that corresponded with a heightened demand for fresh water from Lake Michigan.⁸⁵ To quench its citizens' thirst, Chicago increased the amount of diverted lake water between 1900 and 1924 from 2,541 cubic feet per second to 8,500 cubic feet per second.⁸⁶ Such a drastic increase had cognizable effects on Lake Michigan's water levels, leading Wisconsin, Michigan, and New York to file suit against Illinois in the United States Supreme Court.⁸⁷ Among their various claims, the states alleged that Lake Michigan's water levels had decreased by over six inches due to the Chicago Diversion.⁸⁸ In response, Illinois argued chiefly that the diversion was a public health necessity and that it had not caused any actual injury.⁸⁹

Ultimately siding with the plaintiff states, the Supreme Court found that the Chicago Diversion not only lowered Lake Michigan's and Huron's water levels by over six inches, but it also lowered Lake Erie's and Ontario's water levels by five inches.⁹⁰ Thus, the Court concluded that the Great Lakes states were indeed injured by the Chicago Diversion.⁹¹ Nevertheless, the Court did acknowledge Illinois's public health concerns, so rather than outright banning the

Britain Relating to Border Waters Between the United States and Canada, art. III, Jan. 11, 1909, 36 Stat. 2448.

83. See Olson, *supra* note 6, at 35.

84. See generally *Wisconsin v. Illinois (Wisconsin VI)*, 449 U.S. 48 (1980); *Wisconsin v. Illinois (Wisconsin V)*, 388 U.S. 426 (1967); *Wisconsin v. Illinois (Wisconsin IV)*, 289 U.S. 395 (1933); *Wisconsin v. Illinois (Wisconsin III)*, 281 U.S. 696 (1930); *Wisconsin v. Illinois (Wisconsin II)*, 281 U.S. 179 (1930); *Wisconsin v. Illinois (Wisconsin I)*, 278 U.S. 367 (1929).

85. See Hall & Houston, *supra* note 5, at 752.

86. See *id.* at 754-55.

87. See *id.* at 755 (noting that after the initial suit by Wisconsin, Michigan, and New York, almost every other Great Lakes state joined the cause).

88. See *id.* The states also argued that the diversion was impairing navigation and injuring citizens and property. *Id.*

89. See *Wisconsin I*, 278 U.S. at 410.

90. See *id.* at 407.

91. See *id.* at 408 (recognizing that the diversion resulted in injury "to navigation and commercial interests, to structures, to the convenience of summer resorts, to fishing and hunting grounds, to public parks and other enterprises, and to riparian property generally").

practice, it ordered a “phased reduction.”⁹² As a whole, the landmark saga over the Chicago River Diversion demonstrates the impact of the Boundary Waters Treaty’s failure to incorporate Lake Michigan into its framework.⁹³ At that time, it also signified the need for improved forms of governance to achieve the original goal of Great Lakes protection.⁹⁴

2. The Great Lakes Charter of 1985

Because of the Boundary Waters Treaty’s failure to protect groundwater and incorporate Lake Michigan into its framework, the eight governors of the Great Lakes states and the two premiers of Ontario and Quebec signed the Great Lakes Charter of 1985.⁹⁵ This nonbinding agreement professed that “the water resources of the Great Lakes Basin are precious public resources, shared and held in trust.”⁹⁶ Notably, it also acknowledged that the waters within the Great Lakes are part of one unified system.⁹⁷ While the Great Lakes Charter did recognize the harmful impact diversions could have on the lakes and established impressive goals to prevent them,⁹⁸ a lack of political will and enforcement mechanisms prevented the Charter from living up to its potential.⁹⁹ As a result, the Great Lakes Charter of 1985 did not adequately fulfill Great Lakes governance need,

92. Hall & Houston, *supra* note 5, at 756. After almost a century of litigation, the Chicago diversion is currently capped at 3,200 cubic feet per second. *Id.*

93. See Olson, *supra* note 6, at 35.

94. See *id.*

95. See Scanlan, Sinykin & Krohelski, *supra* note 82, at 51; see also GEORGE WILLIAM SHERK, DIVIDING THE WATERS: THE RESOLUTION OF INTERSTATE WATER CONFLICTS IN THE UNITED STATES 33-34 (2000) (noting that the Supreme Court’s decision in *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982), was also an impetus for creating the Great Lakes Charter).

96. The Great Lakes Charter: Principles for Management of Great Lakes Water Resources, Feb. 11, 1985, <http://www.gsgp.org/projects/water/docs/GreatLakesCharter.pdf> [<https://perma.cc/K8BJ-44L3>]. For additional reference, see James M. Olson, *Navigating the Great Lakes Compact: Water, Public Trust, and International Trade Agreements*, 2006 MICH. ST. L. REV. 1103, 1121.

97. See Scanlan, Sinykin & Krohelski, *supra* note 82, at 51. The Great Lakes Charter acknowledged that the Great Lakes Basin waters are all “interconnected and part of a single hydrologic system.” *Id.*

98. See *id.* at 52.

99. See *id.*

illustrating the necessity for new legislation—the Water Resources Development Act.¹⁰⁰

3. *Water Resources Development Act of 1986*

After the creation of the Great Lakes Charter, Congress explicitly recognized the harmful impact that water diversions would have on the Great Lakes and its tributaries, so it enacted the Water Resources Development Act (WRDA).¹⁰¹ The WRDA expressly bans out-of-basin diversions and exports from the Great Lakes unless approved by the unanimous consent of all eight governors of the Great Lakes states—Michigan, Wisconsin, Ohio, Minnesota, Illinois, Indiana, Pennsylvania, and New York.¹⁰² Unlike the Great Lakes Charter, which only required approval for diversions exceeding five or more million gallons per day, the WRDA included no such limitation and required approval for all out-of-basin diversions, no matter how small.¹⁰³ Additionally, because the WRDA was an act of Congress, it was legally enforceable, giving it more power than the 1985 Charter.¹⁰⁴ However, while the WRDA was a seemingly powerful piece of legislation needed to protect the Great Lakes, it did not outline any decision-making standards to guide the evaluation of potential diversion requests.¹⁰⁵

100. See *id.* at 53 (“Hence, the Great Lakes Charter fails to require adequate regulations governing shared access and use of the trust property.”).

101. See Olson, *supra* note 96, at 1121 (“Recognizing that diversions of water from the Great Lakes and tributary waters would adversely impact domestic, industrial, and navigational uses in the Basin as well as the environment, Congress passed [the Water Resources and Development Act].”).

102. See Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1109(d), 100 Stat. 4082, 4231 (1986) (“No water shall be diverted from any portion of the Great Lakes within the United States, or from any tributary within the United States of any of the Great Lakes, for use outside the Great Lakes basin unless such diversion is approved by the Governor of each of the Great Lakes States.”).

103. See Scanlan, Sinykin & Krohelski, *supra* note 82, at 54 (explaining the differences between the Great Lakes Charter and the WRDA).

104. See *id.*

105. See *id.* at 56; see also Bielecki, *supra* note 75, at 181 (stating that the lack of decision-making standards made the WRDA “vulnerable to legal challenges”).

4. *The Great Lakes Charter Annex of 2001*

Due to heightened pressures on the Great Lakes Basin and its ecosystem,¹⁰⁶ the eight governors of the Great Lakes states and the two premiers of Ontario and Quebec reconvened to draft and enact a supplement to the Great Lakes Charter of 1985.¹⁰⁷ Unlike the Charter, the Annex was both binding and legally enforceable, as it required all the provinces and states to come to a formal and legally binding agreement and enact corresponding legislation within three years.¹⁰⁸ It also established decision-making standards.¹⁰⁹ For instance, when faced with requests for new or increased withdrawals, the Annex asserted that the governors should make their decision with the overarching goal of preventing or mitigating any permanent water loss from the Great Lakes Basin.¹¹⁰ To accomplish this objective, requesting parties would be required to return the amount of water withdrawn and additionally impose conservation measures.¹¹¹ Likewise, any new or increased withdrawals could neither impair Great Lakes water quality or quantity, nor be a detriment to water-dependent resources.¹¹² Further, the Annex required parties seeking new or increased withdrawals to improve water quality and any water-dependent resources.¹¹³ Finally, the new or increased diversion had to comport with the “applicable laws and treaties.”¹¹⁴ Notably, the Annex maintained the existing ban on diversions under the WRDA in the absence of all eight Great Lakes governors’ consent.¹¹⁵ Thus, as a whole, the Annex served as the final step in the Great

106. See, e.g., Bridget Donegan, Comment, *The Great Lakes Compact and the Public Trust Doctrine: Beyond Michigan and Wisconsin Common Law*, 24 J. ENVTL. L. & LITIG. 455, 456 (2009). A major impetus inducing the drafting and creation of the Annex occurred in 1998 when a company in Ontario sought to ship tankers of Lake Superior water to Asia. See *id.*

107. See Olson, *supra* note 6, at 35 (“Because of the increased pressures on the Great Lakes since 1985, the premiers and governors in late 2000 released Annex 2001 to supplement the Great Lakes Charter in an effort to promote fundamental principles of cooperation and to protect, conserve, and improve the waters.”).

108. See *id.*

109. See Bielecki, *supra* note 75, at 181-82; see also Scanlan, Sinykin & Krohelski, *supra* note 82, at 56.

110. See Scanlan, Sinykin, & Krohelski, *supra* note 82, at 56-57.

111. See *id.*

112. See *id.*

113. See *id.*

114. *Id.*

115. See *id.* at 56-57.

Lakes governance bridge from the Boundary Waters Treaty to the Great Lakes–St. Lawrence River Basin Water Resources Compact.¹¹⁶

C. The Great Lakes–St. Lawrence River Basin Water Resources Compact

The monumental decision to enter into the Great Lakes Compact¹¹⁷ and its companion Great Lakes–St. Lawrence River Basin Sustainable Water Resources Agreement (Agreement)¹¹⁸ signified the culmination of a century’s worth of collaborative efforts to protect the integrity and vitality of the Great Lakes.¹¹⁹ On December 13, 2005, all eight governors of the Great Lakes states and the two Canadian provinces signed these “historic agreement[s],” which once again recognized the need for basin-wide management.¹²⁰ However, to be fully effective and have the force of law, each of the eight states had to ratify the Compact and Congress had to give its consent.¹²¹ This event ultimately occurred on October 3, 2008, and the comprehensive framework intended to protect the Great Lakes Basin in the most sustainable way became binding law.¹²² Due to the Compact’s landmark nature, some basic background on interstate

116. See Bielecki, *supra* note 75, at 183 (noting that the Annex “set the stage” for both the Great Lakes–St. Lawrence River Basin Water Resources Compact and the accompanying Sustainable Water Resources Agreement).

117. See generally Great Lakes–St. Lawrence River Basin Compact, Pub. L. No. 110–342, 122 Stat. 3739 (2008).

118. See generally THE GREAT LAKES–ST. LAWRENCE RIVER BASIN SUSTAINABLE WATER RESOURCES AGREEMENT (2005) [hereinafter AGREEMENT], <http://www.glscompactcouncil.org/Docs/Agreements/Great%20Lakes-St%20Lawrence%20River%20Basin%20Sustainable%20Water%20Resources%20Agreement.pdf> [https://perma.cc/LW5W-P5WM].

119. See *supra* Section I.A (outlining the evolving steps taken to protect the Great Lakes); see also § 1.3(2)(b), (f), 122 Stat. 3743 (describing the purposes of the Compact, including “remov[ing] causes of present and future controversies” and “prevent[ing] significant adverse impacts of Withdrawals and losses on the Basin’s ecosystems and watersheds”).

120. See Scanlan, Sinykin & Krohelski, *supra* note 82, at 57; see also § 1.3(1)(b), 122 Stat. 3742 (“The Waters of the Basin are interconnected and part of a single hydrologic system.”).

121. See Donegan, *supra* note 106, at 462 (noting that before the Compact could become a federally approved law, each signatory had to pass state legislation ratifying it); see also Scanlan, Sinykin & Krohelski, *supra* note 82, at 57 (“Prior to the Compact becoming effective and enforceable, each Great Lakes state must pass legislation adopting the Compact, and then Congress must give its consent.”).

122. See Donegan, *supra* note 106, at 462.

compacts promotes a deeper appreciation for the significance and power it wields.¹²³

1. *Interstate Compacts: A Brief Overview*

Interstate compacts are a dynamic and efficient mechanism for managing complex issues, and they have been a key feature of American government since the colonial era.¹²⁴ They are both contractual and statutory in nature and allow states “to create sub-federal, supra-state administrative agencies: a third tier of governing authority created by the collective action of the member states but not subject to the single authority of any one state.”¹²⁵ Interstate compacts are efficient because they allow states to address unique social, political, economic, and environmental issues that are not necessarily suitable for strictly national governance or control by a single state.¹²⁶ Moreover, they allow for adaptive governance because they enable states to create malleable policies that can mold to fit evolving challenges.¹²⁷ Environmental and natural resource interstate compacts are especially valuable for their flexibility,¹²⁸ and states

123. See *infra* Subsection I.B.1 (providing some succinct and pertinent information pertaining to interstate compacts).

124. See CAROLINE N. BROUN ET AL., *THE EVOLVING USE AND THE CHANGING ROLE OF INTERSTATE COMPACTS: A PRACTITIONER’S GUIDE 1* (2006) (“The Framers of the Constitution understood that the federal structure of American government required formal mechanisms for managing interstate relations, and particularly for managing the complex government, political and economic allegiances that states might form between themselves.”); see also *id.* at 3 (“Compacts are . . . the oldest mechanism available to promote formal interstate cooperation, having their roots in the American colonial era.”); *id.* at 178 (“[T]oday there are more than 200 interstate compacts on the books.”).

125. *Id.* at 11; see also Daniel E. Andersen, Note, *Straddling the Federal-State Divide: Federal Court Review of Interstate Agency Actions*, 101 IOWA L. REV. 1601, 1621-22 (2016) (“[I]nterstate agencies may take many forms, [but] they usually function to accomplish multi-state objectives, coordinate interstate efforts to solve wide-reaching problems, oversee complex transactions, and conserve resources.”).

126. See BROUN ET AL., *supra* note 124, at 21 (“[I]nterstate compacts represent a political compromise between constituent elements of the Union. Such agreements are made to address interests and problems that do not coincide easily with the national boundaries or state lines—interests that may be badly served or not served at all by the ordinary channels of national or state political action.”).

127. See *id.* at 27 (“Compacts . . . enable the states to develop adaptive structures that can evolve to meet new and increased challenges that naturally arise over time.”); see, e.g., *Colorado v. Kansas*, 320 U.S. 383, 392 (1943) (noting how flexible compacts were used as a tool to address both present and future issues).

128. See BROUN ET AL., *supra* note 124, at 261.

have commonly utilized them for allocating water, controlling pollution, planning and flood control, and other regulatory purposes.¹²⁹ Consequently, because of the multitude of threats constantly facing the Great Lakes, it is unsurprising that the eight governors of the Great Lakes states elected to create an interstate compact subsequent to the Annex of 2001 as a means of ensuring that the waters and their tributaries are protected in perpetuity.¹³⁰

2. *The Great Lakes Compact: Pertinent Provisions*

As a federally recognized and enforceable law, the Great Lakes Compact explicitly recognizes that both the surface and groundwater within the Great Lakes Basin are treasures to be forever held in trust by the Great Lakes states.¹³¹ An elementary finding of the Compact emanating from this principle is that future diversions have the potential to be catastrophic to the Basin as a whole.¹³² Consequently, to protect the entire Great Lakes Basin, the Compact virtually outlaws any new or increased diversions.¹³³ There are only three permissible exceptions to this blanket prohibition, making the quest for Great Lakes water a difficult feat.¹³⁴ These exceptions include the

129. See *id.* at 263-64 (“[I]nterstate compacts are a common method [of] allocat[ing] water between and among states bordering on water supplies including rivers, lakes, and bays.”); see also SHERK, *supra* note 95, at 30-36.

130. See BROUN ET AL., *supra* note 124, at 278 (“Allocation of water from the Great Lakes has historically presented national and international issues.”).

131. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 1.3(1)(a), 122 Stat. 3739, 3742 (2008) (“The Waters of the Basin are precious public natural resources shared and held in trust by the States.”); see also *id.* § 1.2, 122 Stat. at 3742 (defining “[w]ater” as “ground or surface water contained within the Basin”).

132. See *id.* § 1.3(1)(d), 122 Stat. at 3742 (“Future Diversions . . . of Basin Water resources have the potential to significantly impact the environment, economy[,] and welfare of the Great Lakes–St. Lawrence River region.”).

133. See *id.* § 4.8, 122 Stat. at 3752 (“All New or Increased Diversions are prohibited, except as provided for in this Article.”); see also *id.* § 1.2, 122 Stat. at 3740 (“Diversion means a transfer of Water from the Basin into another watershed, or from the watershed of one of the Great Lakes into that of another by any means of transfer, including but not limited to a pipeline, canal, tunnel, aqueduct, channel, modification of the direction of a water course, a tanker ship, tanker truck or rail tanker but does not apply to Water that is used in the Basin or a Great Lake watershed to manufacture or produce a Product that is then transferred out of the Basin or watershed. Divert has a corresponding meaning.”).

134. See *id.* § 4.9(1)-(3), 122 Stat. at 3752-54; see also *id.* § 1.2, 122 Stat. at 3742 (“Straddling Community means any incorporated city, town or the equivalent thereof, wholly within any County that lies partly or completely within the Basin,

Straddling Communities Exception,¹³⁵ the Intra-Basin Transfer Exception,¹³⁶ and the Straddling Counties Exception.¹³⁷ To meet the threshold and satisfy one of these exceptions, not only must a petitioning party's proposal be unanimously approved, but it must also fulfill certain requirements outlined in the Compact's Exception Standards.¹³⁸ These standards include establishing that "[t]he need for . . . the proposed [e]xception cannot be reasonably avoided"; that the amount needed under the exception is reasonable to achieve its purpose; that all the water taken under the exception will be returned

whose corporate boundary existing as of the effective date of this Compact, is partly within the Basin or partly within two Great Lakes watersheds."); *id.* § 1.2, 122 Stat. at 3741 ("Intra-Basin Transfer means the transfer of Water from the watershed of one of the Great Lakes into the watershed of another Great Lake."); *id.* § 1.2, 122 Stat. at 3740 ("Community within a Straddling County means any incorporated city, town or the equivalent thereof, that is located outside the Basin but wholly within a County that lies partly within the Basin and that is not a Straddling Community.").

135. *See id.* § 4.9(1), 122 Stat. at 3752 ("A Proposal to transfer Water to an area within a Straddling Community but outside the Basin or outside the source Great Lake Watershed shall be excepted from the prohibition against Diversions and be managed and regulated by the Originating Party provided that . . . [certain conditions be met.]").

136. *See id.* § 4.9(2), 122 Stat. at 3753 ("A Proposal for an Intra-Basin Transfer that would be considered a Diversion under this Compact, and not already excepted pursuant to paragraph 1 of this Section, shall be excepted from the prohibition against Diversions, provided that . . . [certain conditions be met.]").

137. *See id.* § 4.9(3), 122 Stat. at 3753-54 ("A Proposal to transfer Water to a Community within a Straddling County that would be considered a Diversion under this Compact shall be excepted from the prohibition against Diversions, provided that it satisfies all of the following conditions: (a) The Water shall be used solely for the Public Water Supply Purposes of the Community within a Straddling County that is without adequate supplies of potable water; (b) The Proposal meets the Exception Standard, maximizing the portion of water returned to the Source Watershed as Basin Water and minimizing the surface water or groundwater from outside the Basin; (c) The Proposal shall be subject to management and regulation by the Originating Party, regardless of its size; (d) There is no reasonable water supply alternative within the basin in which the community is located, including conservation of existing water supplies; (e) Caution shall be used in determining whether or not the Proposal meets the conditions for this Exception. This Exception should not be authorized unless it can be shown that it will not endanger the integrity of the Basin Ecosystem; (f) The Proposal undergoes Regional Review; and, (g) The Proposal is approved by the Council. Council approval shall be given unless one or more Council Members vote to disapprove. A Proposal must satisfy all of the conditions listed above. Further, substantive consideration will also be given to whether or not the Proposal can provide sufficient scientifically based evidence that the existing water supply is derived from groundwater that is hydrologically interconnected to the Waters of the Basin.").

138. *See id.* § 4.9(4), 122 Stat. at 3754.

to the source watershed; that there will be “no significant individual or cumulative adverse impacts” on the entire Basin; that the party will implement conservation measures along with the exception; and that the exception will also comply with other applicable laws, including the Boundary Waters Treaty of 1909.¹³⁹

The Great Lakes Compact provides for dispute resolution procedures in the event that any person¹⁴⁰ disagrees with a decision the governors make.¹⁴¹ For instance, if all eight governors unanimously decide that an application satisfies the exception standards and elect to approve an otherwise prohibited diversion, “[a]ny [p]erson aggrieved” by such action can request to have a hearing before the Compact Council.¹⁴² Upon exhaustion of all administrative remedies, the aggrieved person expressly retains a

139. *Id.* (“Proposals subject to management and regulation in this Section shall be declared to meet this Exception Standard and may be approved as appropriate only when the following criteria are met: (a) The need for all or part of the proposed Exception cannot be reasonably avoided through the efficient use and conservation of existing water supplies; (b) The Exception will be limited to quantities that are considered reasonable for the purposes for which it is proposed; (c) All Water Withdrawn shall be returned, either naturally or after use, to the Source Watershed less an allowance for Consumptive Use. No surface water or groundwater from the outside the Basin may be used to satisfy any portion of this criterion except if it: (i) Is part of a water supply or wastewater treatment system that combines water from inside and outside of the Basin; (ii) Is treated to meet applicable water quality discharge standards and to prevent the introduction of invasive species into the Basin; (d) The Exception will be implemented so as to ensure that it will result in no significant individual or cumulative adverse impacts to the quantity or quality of the Waters and Water Dependent Natural Resources of the Basin with consideration given to the potential Cumulative Impacts of any precedent-setting consequences associated with the Proposal; (e) The Exception will be implemented so as to incorporate Environmentally Sound and Economically Feasible Water Conservation Measures to minimize Water Withdrawals or Consumptive Use; (f) The Exception will be implemented so as to ensure that it is in compliance with all applicable municipal, State and federal laws as well as regional interstate and international agreements, including the Boundary Waters Treaty of 1909; and, (g) All other applicable criteria in Section 4.9 have also been met.”).

140. *See id.* § 1.2, 122 Stat. at 3741 (defining “[p]erson” as “a human being or a legal person, including a government or a nongovernmental organization, including any scientific, professional, business, non-profit, or public interest organization or association that is neither affiliated with, nor under the direction of a government”).

141. *See id.* § 7.3, 122 Stat. at 3761.

142. *Id.* § 7.3(1), 122 Stat. at 3761 (“Any Person aggrieved by any action taken by the Council pursuant to the authorities contained in this Compact shall be entitled to a hearing before the Council.”); *see also id.* § 2.2, 122 Stat. at 3744 (noting that “[t]he Council” consists of the governors of the eight Great Lakes states).

right of judicial review concerning the Council's action.¹⁴³ This review can occur in either the United States District Court for the District of Columbia or the federal district court where the Compact Council has its offices.¹⁴⁴ Notably, the Compact does not explicitly define who qualifies as an "aggrieved person," therefore leaving the question open to interpretation when challenges arise.¹⁴⁵

Because the public trust doctrine is so entrenched in the Great Lakes states, its principles have influenced management efforts to protect the waters in perpetuity.¹⁴⁶ Moreover, the evolution of Great Lakes governance from the Boundary Waters Treaty to the comprehensive Great Lakes Compact corresponded with heightened awareness of the need to protect the Great Lakes from systemic threats.¹⁴⁷ One threat that has always been on the conscience of those entrusted with protecting the lakes is the diversion of water from the Great Lakes Basin.¹⁴⁸ As the current management framework, the Compact expressly reflects this concern in its general ban against the practice and in its limited exceptions provisions.¹⁴⁹ Given the delicate nature of this precious, unrivaled resource and the potential gravity

143. See *id.* § 7.3(1), 122 Stat. at 3761.

144. See *id.* (noting that the action seeking judicial review must occur within ninety days); see also *Contact Information*, GREAT LAKES–ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, <http://www.gslcompactcouncil.org/Contact.aspx> [https://perma.cc/W6BH-SE63] (last visited Apr. 9, 2018) (noting that the Council is headquartered in Chicago, Illinois).

145. See § 7.3(1), 122 Stat. at 3761; see also *id.* § 1.2, 122 Stat. at 3739-42 (illustrating that "aggrieved" does not appear in the Compact's definition section).

146. See Olson, *supra* note 2, at 396 ("[R]ights of public use or public trust in Great Lakes and navigable waters . . . [are] deeply anchored in the common law and sovereignty of both countries, the states, and provinces.").

147. See Bielecki, *supra* note 75 and accompanying text.

148. See, e.g., Scanlan, Sinykin & Krohelski, *supra* note 82, at 50 (asserting that the Boundary Waters Treaty of 1909 recognized that diversions could negatively alter water levels and flows); see also § 1.3(1)(d), 122 Stat. at 3742 (declaring that "[f]uture [d]iversions and [c]onsumptive [u]ses of Basin [w]ater resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes–St. Lawrence River region"); Olson, *supra* note 96, at 1121 (discussing how the Water Resources Development Act expressly banned out-of-basin diversions because Congress recognized the detrimental impact they could have not only on the environment, but also on the domestic, industrial, and navigational uses occurring within the Great Lakes Basin); Scanlan, Sinykin & Krohelski, *supra* note 82, at 51 (noting how the signatories of the 1985 Great Lakes Charter set forth goals to mitigate the adverse effects diversions posed).

149. See §§ 4.8, 4.9(1)-(3), 122 Stat. at 3752-54.

decisions impacting it could have, the Compact enables aggrieved persons to challenge the Council's actions as a safeguard.¹⁵⁰

II. STANDING: ARE YOU "AGGRIEVED"?

As a resource spanning a surface area of more than 300,000 square miles that provides drinking water for over twenty-three million people,¹⁵¹ the Great Lakes push the traditional boundaries of standing.¹⁵² Standing is a foundational prerequisite necessary to bring a cause of action, and its elements on the most general level include injury, causation, and redressability.¹⁵³ The legislature can further circumscribe the standing threshold in a statute; under the Great Lakes Compact, "[a]ny [p]erson aggrieved" by Compact Council action can potentially meet it.¹⁵⁴ However, cases arising under the Great Lakes Compact challenging Compact Council action merit special attention since the document fails to define what classifies a person as aggrieved in its definition section and in its dispute resolution provision.¹⁵⁵ Thus, this question of interpretation is of particular importance since the magnitude of the Great Lakes as a resource uniquely complicates traditional standing perceptions.¹⁵⁶

150. See *id.* § 7.3(1), 122 Stat. at 3761.

151. See Hall & Houston, *supra* note 5, at 723 ("Approximately 35 million people live within the Great Lakes Basin, and 23 million depend on the Lakes for their drinking water. The Lakes are more than 750 miles wide and have a surface area greater than 300,000 square miles; there are 25,000 square miles of connected smaller lakes, hundreds of miles of navigable rivers, and 10,000 miles of shoreline.").

152. See STONE, *supra* note 26, at 35 ("Standing, broadly understood, is the authority of someone to initiate an action. The term in its narrower common use is probably limited to the right of nongovernmental parties to institute judicial review.").

153. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); see also *infra* Section II.A (discussing the elements of standing in further detail).

154. Great Lakes–St. Lawrence River Basin Water Resources Compact, 122 Stat. 3761 § 7.3(1).

155. See *supra* note 145 and accompanying text.

156. See generally STONE, *supra* note 26, at 35; see also Hall & Houston, *supra* note 5, at 723 (highlighting the magnitude of the Great Lakes as a shared, interconnected resource).

A. Standing Overview

Standing is a justiciability filter that determines whether a party can challenge a particular issue or decision.¹⁵⁷ While the term itself does not appear in the Constitution,¹⁵⁸ it is nonetheless a doctrine with constitutional roots based on the “‘case’ or ‘controversy’” requirement expressed in Article III.¹⁵⁹ However, despite this origin, the particular standing elements do not come from the Constitution, but are rather the product of evolving common law and state codes.¹⁶⁰ While their application is context dependent,¹⁶¹ there are three traditionally recognized elements that a challenging party must satisfy.¹⁶² The first requirement is that the party must have suffered a concrete and particularized “injury in fact” that is “actual or imminent” instead of “conjectural” or “hypothetical.”¹⁶³ This element has been the subject of much contest, as there is debate over what can constitute a “legally cognizable injury.”¹⁶⁴ The second

157. See STONE, *supra* note 26, at 35 (“Standing is only one of a number of justiciability issues that a party has to satisfy to get through the courthouse door.”); see also *id.* (asserting that “to achieve *standing* does not imply *winning*”).

158. See *id.* (“The term ‘standing’ makes no appearance in the Constitution.”).

159. See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

160. See STONE, *supra* note 26, at 36; see also *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 615 (2d Cir. 1965) (“Although a ‘case’ or ‘controversy’ which is otherwise lacking cannot be created by statute, a statute may create new interests or rights and thus give standing to one who would otherwise be barred by the lack of a ‘case’ or ‘controversy.’”).

161. See STONE, *supra* note 26, at 49 (“The standards for standing are not the same in each setting.”).

162. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (“Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements.”).

163. *Id.* (“First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical.”) (internal quotation marks and citations omitted).

164. James R. May, *Constitutional Law and the Future of Natural Resource Protection*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 124, 140

prerequisite is more straightforward, requiring that the defendant's conduct in the case be causally connected or "fairly . . . trace[able]" to the complainant's alleged injury.¹⁶⁵ Finally, the third element of standing demands that the challenging party demonstrate redressability, namely that a favorable outcome in the case is likely to adequately remedy the injury claimed.¹⁶⁶

One particular facet of standing worth noting involves a party's allegation that procedural error has occurred resulting in injury to a concrete interest.¹⁶⁷ For a party to claim procedural injury, the defendant, typically a governmental agency, must have failed to comply with a statutorily-mandated procedural requirement that exists to protect that concrete interest.¹⁶⁸ To achieve standing with a procedural rights claim, the critical point is that the challenging party does not have to satisfy the elements of causation and

(Lawrence J. MacDonnell & Sarah F. Bates eds., 2010) (stating that "[i]n 1972, the Court recognized non-economic aesthetic and environmental interests as legally cognizable 'injuries' that can serve as a sufficient basis for constitutional standing under Article III") (citing *Sierra Club v. Morton*, 405 U.S. 727 (1972)). May pointed out that this is in contrast with *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, which clarified that "it is injury to a person, and not the environment, that matters, thus obviating any need to show environmental degradation to support constitutional injury." *Id.* (citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 167 (2000)).

165. *Lujan*, 504 U.S. at 560-61 ("Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly . . . trace[able]' to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

166. *See id.* at 561 ("Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (quoting *Simon*, 426 U.S. at 38, 43).

167. *See, e.g., id.* at 562. The challengers in *Lujan v. Defenders of Wildlife* claimed that they suffered a procedural injury based on the Secretary of the Interior's failure to follow the consultation requirement of the Endangered Species Act. *Id.*

168. *See, e.g.,* Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, 122 Stat. 3739, 3760, § 6.1(1) (2008) ("The Parties recognize the importance and necessity of public participation in promoting management of the Water Resources of the Basin. Consequently, all meetings of the Council shall be open to the public, except with respect to issues of personnel."); *see also id.* § 6.2(1), 122 Stat. at 3760 ("To ensure adequate public participation, each Party or the Council shall . . . [p]rovide public notification of receipt of all Applications and a reasonable opportunity for the public to submit comments before Applications are acted upon."); STONE, *supra* note 26, at 44 (noting that "[t]he 'injury' is complete when the right to the procedure is violated" like when an agency fails to provide an opportunity for comment after notice of a proposed rule, the concrete interest in public participation suffers).

redressability.¹⁶⁹ Rather, the sole prerequisite that the party must prove is the presence of a concrete injury in fact, and as implied in *Lujan v. Defenders of Wildlife*, the standing threshold for this type of claim is not particularly difficult to clear.¹⁷⁰

Finally, because it is common for organizations to initiate lawsuits, courts have also developed standards for such complainants to meet the standing threshold.¹⁷¹ As dictated in *Hunt v. Washington State Apple Advertising Commission*, an organization can file suit on behalf of its members so long as one of them would establish standing individually; its organizational purpose is “germane” to the interest alleged in the claim; and lastly, neither the suit nor relief requested would require an individual member to participate.¹⁷² Even though standing can be difficult to satisfy, those wishing to challenge actions and decisions in situations involving the environment and natural resources should not be dissuaded.¹⁷³ Further, there are public policy reasons for interpreting standing broadly when it comes to

169. See *Lujan*, 504 U.S. at 572 n.7 (“The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency’s failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.”).

170. See *id.* (“There is this much truth to the assertion that ‘procedural rights’ are special.”); see also STONE, *supra* note 26, at 44 (“Scalia suggested that a party whose complaint is aimed at vindicating a *procedural* right has an especially low hurdle to clear to achieve standing.”).

171. See *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

172. See *id.* (“Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”).

173. See May, *supra* note 164, at 140 (“Despite these limits, standing doctrine should not prove an insurmountable bar to plaintiffs in natural resources cases.”); see e.g., *Juliana v. United States*, 217 F. Supp. 3d 1224, 1242-48 (D. Or. 2016) (holding that plaintiffs satisfied Article III standing requirements in their lawsuit alleging that the policies and omissions of former President Obama and other executive branch agencies had failed to curb greenhouse gas emissions and therefore contributed to a destabilized climate); *Trout Unlimited Muskegon White River Chapter v. City of White Cloud*, 489 N.W.2d 188, 191 (Mich. Ct. App. 1992) (holding that a nonprofit dedicated to “protecting cold-water [fishing] resources” had standing to challenge reconstruction of a dam based on, among other issues, a public trust violation claim).

such suits, especially as the effects of climate change continue to take their toll.¹⁷⁴

B. “Aggrieved” Person Interpretations

As in the Great Lakes Compact, many statutes state that persons must be “aggrieved” to initiate a cause of action.¹⁷⁵ However, when the statute or law—like the Compact—fails to define “aggrieved person,” courts apply the zone-of-interest test to see if a challenging party can be classified as such.¹⁷⁶ Under this test, a person cannot be aggrieved if his or her “interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.”¹⁷⁷ The Court did not intend the zone-of-interest test to be particularly onerous;¹⁷⁸ however, resulting interpretations in case law exemplify an oscillation between narrow and broad.¹⁷⁹

174. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007) (holding that Massachusetts had standing because “the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced to some extent if petitioners received the relief they seek”); see also Mark Squillace, *Embracing a Civic Republican Tradition in Natural Resources Decision-Making*, in *THE EVOLUTION OF NATURAL RESOURCES LAW AND POLICY* 195, 197 (Lawrence J. MacDonnell & Sarah F. Bates eds., 2010) (“The proliferation of lawsuits brought by an ever growing number of national and local environmental and conservation groups attests to their popularity as a vehicle for fostering the protection of environmental values, and few would question their significant role in influencing public policy.”).

175. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 7.3(1), 122 Stat. 3739, 3761 (2008).

176. See Kristy Meyer, *Opponent Testimony–House Bill 473 (As Amended)*, OHIO ENVT. COUNCIL 1, 4 (2012), http://173.255.227.219/sites/default/files/04_2012_OEC_Testimony.pdf [<https://perma.cc/5DDZ-J2U3>] (“When a federal statute does not restrict or define ‘any aggrieved person,’ the U.S. Supreme Court applies the ‘zone of interest’ test to determine whether a particular plaintiff has the right to sue or appeal. To satisfy this test, a plaintiff need not show that Congress specifically intended the legislation to benefit them, but rather that ‘the complainant is *arguably* within the zone of interests to be protected by the statute.’”) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970); *Nat’l Credit Union Admin. v. First Nat’l Bank & Tr. Co.*, 522 U.S. 479, 492 (1998)).

177. *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 399 (1987).

178. *Id.* (“The test is not meant to be especially demanding.”).

179. Compare *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (illustrating a narrow interpretation), with *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 616 (2d Cir. 1965) (illustrating a broad interpretation). See also *White Lake Improvement Ass’n v. City of Whitehall*, 177 N.W.2d 473, 475, 480 (Mich.

For instance, in *Sierra Club v. Morton*, the Supreme Court found that the organization was not an “aggrieved person” and therefore lacked standing to sue on behalf of the Mineral King Valley¹⁸⁰ under the Administrative Procedure Act.¹⁸¹ In this case, the United States Forest Service approved Walt Disney Enterprises, Inc.’s proposal to build a ski resort in the Mineral King Valley, which was a largely undeveloped wilderness area.¹⁸² In an effort to enjoin the project, the Sierra Club filed suit claiming that allowing construction of the ski resort would significantly impair the environment for present and future generations.¹⁸³ When faced with the threshold determination of whether the Sierra Club had a “sufficient stake” in the matter,¹⁸⁴ the Court found that a mere interest in the problem was not enough.¹⁸⁵ Even though the category of

Ct. App. 1970) (holding that a nonprofit organization had standing as an aggrieved person under the Water Resources Commission Act to raise a nuisance-abatement claim for an injunction to stop the defendant from dumping waste into White Lake).

180. See *Sierra Club*, 405 U.S. at 728, 741 (noting that “[t]he Mineral King Valley is an area of great beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park . . . [and that it] is designated as a national game refuge by special Act of Congress”).

181. See *id.* at 741; see also Administrative Procedure Act § 10, 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

182. See *Sierra Club*, 405 U.S. at 728-29.

183. *Id.* at 734 (“The injury alleged by Sierra Club [would] be incurred entirely by reason of the change in the uses to which Mineral King [would] be put, and the attendant change in the aesthetics and ecology of the area . . . [The Club’s claim was] that the development would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.”) (citations omitted).

184. See *id.* at 731-32 (“The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue.”).

185. See *id.* at 739-40 (“But a mere ‘interest in a problem,’ no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization ‘adversely affected’ or ‘aggrieved’ within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation’s natural heritage from man’s depredations. But if a ‘special interest’ in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide ‘special interest’ organization however small or short-lived. And if any group with a bona fide ‘special interest’ could initiate such

cognizable injuries for standing purposes had broadened to include aesthetic, conservational, recreational, and economic values,¹⁸⁶ the judicial process was not a means to “vindicate . . . value preferences.”¹⁸⁷ Therefore, because the Sierra Club failed to establish in its complaint that the organization or its members would be specifically impacted by the development, it lacked standing to maintain the action.¹⁸⁸

In contrast, the Second Circuit Court of Appeals found in *Scenic Hudson Preservation Conference v. Federal Power Commission* that petitioners, a group comprised of conservationist nonprofits and three towns, were “aggrieved” parties and therefore had standing under the Federal Power Act.¹⁸⁹ In this case, petitioners challenged the Federal Power Commission’s decision to grant a license to a company seeking to build a pumped-storage hydroelectric project on the west side of the Hudson River.¹⁹⁰ Raising concerns over the impact the project would have on economic, aesthetic, recreational, and conservational uses “in an area of unique beauty and major historical significance,”¹⁹¹ petitioners urged that the

litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so.”).

186. See *id.* at 738 (“We [previously] noted this development with approval . . . in saying that the interest alleged to have been injured ‘may reflect “aesthetic, conservational, and recreational” as well as economic values.’ But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.”) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970)).

187. See *id.* at 740.

188. See *id.* at 735, 741; see also STONE, *supra* note 26, at xiii (“After all, the Ninth Circuit reasoned, the Sierra Club itself ‘does not allege that it is “aggrieved” or that it is “adversely affected” within the meaning of the rules of standing. Nor does the fact that no one else appears on the scene who is in fact aggrieved and is willing or desirous of taking up the cudgels create a right in appellee. The right to sue does not inure to one who does not possess it, simply because there is no one else willing and able to assert it.’”) (quoting *Sierra Club v. Hickel*, 433 F.2d 24, 32 (9th Cir. 1970), *aff’d sub nom. Sierra Club v. Morton*, 405 U.S. 727 (1972)).

189. See *Scenic Hudson Pres. Conf. v. Fed. Power Comm’n*, 354 F.2d 608, 611, 616 (2d Cir. 1965); see also Federal Power Act § 313(b), 16 U.S.C. § 8251(b) (1958) (“Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located.”).

190. See *Scenic Hudson*, 354 F.2d at 611.

191. *Id.* at 613 (“The highlands and gorge of the Hudson offer one of the finest pieces of river scenery in the world.”).

potential injury required that the licensing order be set aside.¹⁹² Rejecting the Commission's claim that "aggrieved party" should be interpreted narrowly under the Act and that petitioners did not satisfy the requisite standing elements, the court held that those who have demonstrated enough of a special interest in the contested area through their activities and conduct are among those aggrieved.¹⁹³ Thus, the court evaluated the aggrieved party question based on the specific circumstances of the case at hand and allowed the petitioners to seek review.¹⁹⁴

Overall, standing is an unavoidable hurdle that a person seeking to challenge an action or decision must clear before he can have his day in court.¹⁹⁵ While the types of injuries that are legally cognizable have broadened,¹⁹⁶ one must also establish the other two standing elements of causation and redressability unless claiming procedural injury.¹⁹⁷ Moreover, when a particular law like the Great Lakes Compact grants standing to any aggrieved person but neglects to provide a definition of the term, a question of interpretation

192. See *id.* at 611.

193. See *id.* at 616 ("In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests."). Compare *Rd. Review League v. Boyd*, 270 F. Supp. 650, 661 (S.D.N.Y. 1967) ("I have concluded that these provisions are sufficient, under the principle of *Scenic Hudson*, to manifest a congressional intent that towns, local civic organizations, and conservation groups are to be considered 'aggrieved' by agency action which allegedly has disregarded their interests."), with *Env'tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1097 (D.C. Cir. 1970) ("The interest asserted in such a challenge to administrative action need not be economic. Like other consumers, those who 'consume' - however unwillingly - the pesticide residues permitted by the Secretary to accumulate in the environment are persons aggrieved by agency action within the meaning of a relevant statute. Furthermore, the consumers' interest in environmental protection may properly be represented by a membership association with an organizational interest in the problem.") (internal quotation marks and citations omitted).

194. See *Scenic Hudson*, 354 F.2d at 615 ("[T]he law of standing is a 'complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations.'") (quoting *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 156 (1953)).

195. See *supra* note 181 and accompanying text.

196. See *supra* note 186 and accompanying text.

197. See *supra* Section II.A.

arises.¹⁹⁸ And, as *Sierra Club v. Morton* and *Scenic Hudson Preservation Conference* exemplify, the interpretation of “aggrieved” wavers between narrow and broad depending on the particular circumstances at hand.¹⁹⁹ Consequently, with decisions made under the Great Lakes Compact, the manner in which the Compact Council and reviewing courts interpret the aggrieved person provision will have the power to set major precedent, especially in challenges to the Waukesha Diversion.²⁰⁰

III. THE WAUKESHA DIVERSION APPROVAL: A FIRST OF ITS KIND

The Great Lakes Compact faced its first test when the City of Waukesha, Wisconsin, submitted an application to divert water from Lake Michigan to a location outside the Great Lakes Basin.²⁰¹ Because such a diversion would have landmark significance, the public watched closely as the Compact Council deliberated and evaluated the application’s merits according to the standards outlined in the Compact’s provisions.²⁰² When the Compact Council issued its final decision approving Waukesha’s request on June 21, 2016, opposing organizations immediately expressed their intent to challenge it, and one group, the Great Lakes and St. Lawrence Cities Initiative, did.²⁰³ However, because the Compact Council decided the merits of the Cities Initiative’s claim notwithstanding its uncertainty as to whether the group was an “aggrieved person,” and the Cities Initiative ultimately declined to seek judicial review, the issue remains unresolved and subject to debate in future challenges to the diversion.²⁰⁴ Thus, the situation’s background, the contested application process, and the aftermath of the Council’s decision all

198. See *supra* note 176 and accompanying text.

199. Compare *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972) (employing a narrow interpretation), with *Scenic Hudson*, 354 F.2d at 616 (employing a broad interpretation).

200. See *infra* Part IV (analyzing standing in the context of the Waukesha Diversion Approval).

201. See Matheny, *supra* note 10.

202. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, § 4.9(3)-(4), 122 Stat. 3739, 3753-54 (2008) (detailing the criteria a straddling county must meet in order to be eligible for a diversion).

203. See *infra* Section III.C.

204. See *supra* note 23 and accompanying text.

provide the necessary framework to examine the aggrieved person standard in this particular context.²⁰⁵

A. Why Has Waukesha Had Its Eyes on Lake Michigan?

Waukesha, Wisconsin, has been in search of a new water source for its population of approximately 71,000 people for over a decade,²⁰⁶ as its public water supply is contaminated with naturally occurring radium.²⁰⁷ Because this problem poses a threat to public health and violates the Safe Drinking Water Act, the City has been under a court order to have a radium-free water supply by 2018.²⁰⁸

205. See *infra* Part IV (applying the aggrieved person standard to the situation in Waukesha).

206. See Behm, *supra* note 9 (noting that Waukesha has been after Lake Michigan water for thirteen years); see also *Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, CH2M HILL, 2-1 (Oct. 2013), http://www.waukesha-water.com/downloads/1_City_of_Waukesha_Application_Summary.pdf [<https://perma.cc/QK3D-KR5N>].

207. See Gabe Johnson-Karp, Comment, *That the Waters Shall Be Forever Free: Navigating Wisconsin's Obligations Under the Public Trust Doctrine and the Great Lakes Compact*, 94 MARQ. L. REV. 415, 434 (2010) (noting that the aquifers the City gets its water from “have been so depleted that concentrations of radioactive radium found in [its] drinking water are above levels recognized as acceptable”); see also *Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, *supra* note 206, at 2-3 (“[T]he deep confined aquifer contains radionuclides at concentrations exceeding federal and state drinking water standards. Radionuclides (radium-226, radium-228, and gross alpha) are naturally occurring elements that pose increased risk of cancer if ingested through potable water supplies. Radium is present in the City’s deep aquifer supply at levels up to 3 times greater than the drinking water standard of 5 picocuries per liter (pCi/L).”) (citation omitted).

208. See Kozacek, *supra* note 11 (“Waukesha is under a court order to alleviate naturally-occurring radium contamination in the deep aquifers it currently uses for municipal supplies, which it notes have dropped 107 meters (350 feet) below pre-development water levels.”) (citation omitted); see also GREAT LAKES—ST. LAWRENCE RIVER BASIN WATER RESOURCES COUNCIL, FINAL DECISION 3-4 (2016) [hereinafter FINAL DECISION], <http://www.glsregionalbody.org/Docs/Waukesha/Waukesha--Final%20Decision%20of%20Compact%20Council%206-21-16.pdf> [<https://perma.cc/374P-9PJJ>]; Press Release, Office of the Mayor, State and Waukesha Reach Agreement on Radium Deadline at 1 (July 18, 2017) <http://greatwateralliance.com/wp-content/uploads/2017/07/2017-07-18-PR.pdf> [<https://perma.cc/YUV5-G557>] (“Waukesha had been required to be in full compliance by June 30, 2018 under a 2009 agreement with the state. However, its planned conversion to a radium-compliant Lake Michigan water supply will not be completed until 2023. The new agreement [extending the deadline] recognizes the city’s efforts to implement that new water supply and extends the radium deadline until Sept. 1, 2023.”).

Consequently, Waukesha laid its eyes on Lake Michigan's pure fresh water, believing it to be the only viable alternative source.²⁰⁹ However, while located a mere seventeen miles west of Lake Michigan, Waukesha lies just outside the Great Lakes Basin—a fact that would seemingly render it ineligible for a diversion from the Great Lakes.²¹⁰ Nevertheless, even though the City itself sits within the Mississippi River Basin, Waukesha County straddles the hydrological divide between the two.²¹¹ Such a geographical position makes the City of Waukesha a community within a straddling county capable of applying for an exception to the diversion prohibition under the Great Lakes Compact.²¹² Thus, Waukesha submitted an application and became the first community within a straddling county to file for a diversion since the Compact's ratification.²¹³

B. A Contested Process: The Need for Clean Drinking Water Versus Great Lakes Preservation

Waukesha's application has been the subject of much controversy, and there are meritorious arguments on both sides.²¹⁴ Proponents of the diversion emphatically assert that the public health crisis makes the diversion a necessity, especially since scientific and technical analyses illustrate that Lake Michigan is the only

209. See Kozacek, *supra* note 11; see also Behm, *supra* note 9 (noting that Waukesha conducted studies in 2010 about alternative water supplies, which concluded that Lake Michigan was “the only sustainable resource available for the long term”); Garcia & Schutz, *supra* note 15 (stating how the City argued that drilling deeper wells would lead to increased levels of radium).

210. See Johnson-Karp, *supra* note 207, at 434 (“Despite the [C]ity’s relative proximity to Lake Michigan, Waukesha lies outside the Great Lakes surface water basin and has historically drawn its water from sandstone aquifers and from surface waters from the Mississippi River Basin.”); see also *Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, *supra* note 206, at 1-1.

211. See *Application Summary, City of Waukesha Application for a Lake Michigan Diversion with Return Flow*, *supra* note 206, at 1-1 (“Waukesha County is a straddling county because it lies partly within the Great Lakes basin.”).

212. See *id.*

213. See Johnson-Karp, *supra* note 207, at 417 (noting that “[t]he first community to receive Basin water under the Compact was New Berlin, which lies partly within the Basin and whose application for a diversion of Lake Michigan water was quickly granted, based on the amounts to be withdrawn and the municipality’s location partly within the [B]asin”).

214. See Behm, *supra* note 9 (discussing the varying perspectives on either side of the decision).

reasonable alternative.²¹⁵ Moreover, given the fact that it took thirteen years and millions of dollars to get its application approved, proponents also claim that Waukesha's application process sets a good precedent and will make it difficult for future communities to have the same success.²¹⁶ Further, as dictated in its final decision, the Compact Council will closely monitor Waukesha, so the diversion will not go unchecked.²¹⁷

However, opponents to the diversion remain unconvinced and allege that its approval does in fact set a bad precedent that will open the floodgates to more requests for Great Lakes water as droughts increase and freshwater supplies dwindle.²¹⁸ Additionally, critics

215. See FINAL DECISION, *supra* note 208, at 3-4.

216. See Garcia & Schutz, *supra* note 15 ("[T]he arduous process Waukesha faced in obtaining permission to divert water from Lake Michigan will actually make it harder, not easier for any future communities outside the Great Lakes watershed to do the same."); see also *id.* ("Waukesha has been studying and analyzing this problem for over 10 years and [has] spent millions of dollars getting to this point," [Dan] Injerd[, director of water resources for the Illinois Department of Natural Resources] said. 'We've set an extraordinarily difficult set of criteria, study and analysis that anybody would have to pursue if they wanted to get serious about bringing forth an application. To me, there is no slippery slope. The slope, if anything, instead of pointing downward, is pointing steeply upward.'").

217. See *id.* ("Under the new agreement, Waukesha must submit annual reports to the compact council documenting the daily, monthly and annual amounts of water diverted from Lake Michigan the prior calendar year."); see also FINAL DECISION, *supra* note 208, at 13 ("For a minimum of 10 years from the beginning of return flow to the Basin, the Applicant must implement a scientifically sound plan to monitor the mainstem of the Root River to determine changes that may have resulted from return flow (such as volumes, water temperatures, water quality and periodicity of discharge) in order to adapt future return flow to minimize potential adverse impacts or maximize potential benefits to water dependent resources of the Basin source watershed (*i.e.*, Lake Michigan)."); *id.* ("The Applicant must complete an annual report that documents the daily, monthly and annual amounts of water diverted and returned to the Lake Michigan watershed over the previous calendar year."); *id.* at 14 (describing the performance audit condition).

218. See Garcia & Schutz, *supra* note 15 ("Opponents of the water diversion proposal had worried that approval could set a bad precedent, opening the doors for communities near and far in drought-stricken or contaminated-water areas to start draining freshwater from Lake Michigan."); see also BARLOW, *supra* note 1, at 18 ("If water takings from the Great Lakes of North America are similar to those of global groundwater takings, the Great Lakes could be bone-dry in eighty years."); Matheny, *supra* note 10 ("Waukesha's request was almost universally opposed by environmental groups and regional politicians across the Great Lake states, with many worried about dangerous precedents being set to provide thirsty outsiders access to the Great Lakes."); Comments on the Waukesha Diversion Application, *supra* note 7, at 7 ("While purely hypothetical, there are many municipalities, 'communities,' that straddle the Great Lakes Basin divide – Chicago, Akron, greater

argue that releasing treated wastewater back into a Lake Michigan tributary to comply with the Compact's return flow requirement could introduce harmful contaminants and pollutants back into Lake Michigan's waters and ecosystem.²¹⁹ Ultimately, opponents assert that Waukesha is using the Great Lakes as a scapegoat to solve its radium problem when it has known about the issue for years yet failed to act until tapping into Lake Michigan became a possibility.²²⁰

C. The Decision and Aftermath

After weighing the arguments on both sides following multiple periods of public comment and an in-depth examination of Waukesha's application, the governors of all eight Great Lakes states unanimously approved the City's application to divert water from Lake Michigan.²²¹

As a result of this landmark decision, Waukesha will now be allowed to pump up to an average of 8.2 million gallons of Great Lakes water per day to provide uncontaminated water for its citizens.²²² This approved amount is less than the 10.1 million gallons Waukesha initially requested in its first application and is the result of an amendment designed to ensure that the application more effectively complied with the parameters of the Great Lakes

Milwaukee communities are served by an existing 'straddling' system. There are likely more than 80 counties or similar county provincial areas that straddle the Basin divide with many, many more communities all outside the Basin. With increasing demand for water exacerbated by climate change, water scarcity, and flooding, rapid growth and competition for water in the Basin are anticipated across all industry sectors in the next 20 to 30 years.").

219. See Garcia & Schutz, *supra* note 15 ("Critics also cautioned that water treated at a municipal water treatment plant may contain harmful contaminants that could make their way back into Lake Michigan.").

220. See generally Matheny, *supra* note 10. Candice Miller and Debbie Dingell, Republican and Democrat United States representatives from Michigan, also critiqued that "[t]he city did not exhaust all other alternatives before requesting to siphon Lake Michigan water." *Id.*

221. See Kozacek, *supra* note 11 ("Eight Great Lakes governors voted unanimously to approve a diversion of Lake Michigan water to the city of Waukesha, Wisconsin, which lies just outside of the Great Lakes Basin."); see also FINAL DECISION, *supra* note 208; Garcia & Schutz, *supra* note 15 ("The city of Waukesha on Tuesday was given a green light to divert water from Lake Michigan for its drinking water supply after eight representatives from the states that border the Great Lakes voted unanimously to allow the diversion. A single no vote would have scuttled the city's plan.").

222. See Kozacek, *supra* note 11.

Compact.²²³ Another amendment to the application included a decrease in the water distribution area because the originally proposed area extended into four other communities.²²⁴ Additionally, Michigan further requested that the final decision include a provision allowing for routine audits with only thirty days' advance notice.²²⁵ Likewise, to ensure that the diversion would not go unchecked, Minnesota called for the inclusion of an enforcement provision that would allow either individual states or the Great Lakes states collectively to take action and compel compliance.²²⁶

Waukesha intends to build a water pipeline from Lake Michigan to Milwaukee, Wisconsin, which lies within the Great Lakes Watershed.²²⁷ To comport with the Compact's standards, the same amount of water withdrawn must be returned to the Basin.²²⁸ Therefore, Waukesha plans to treat the withdrawn water as wastewater and then release it into the Root River, which is a tributary that feeds back into Lake Michigan.²²⁹ The pipeline plan

223. See *id.*; see also Matheny, *supra* note 10. Michigan Governor Rick Snyder told the Detroit Free Press that amendments were "essential to his approval of the plan" because they "strengthen[ed] oversight of the agreement's terms." *Id.* He also stated, "It's easy to say no and just walk away[.] . . . I think it's more appropriate to say yes with conditions, because it's a better answer for the Great Lakes itself." *Id.*

224. See Behm, *supra* note 9 (noting that the new distribution "area would include only the city's existing water service area, plus several town islands: small pieces of the Town of Waukesha surrounded by the city").

225. See *id.*; see also FINAL DECISION, *supra* note 208, at 14 (exhibiting the incorporation of Michigan's requested amendment).

226. See Behm, *supra* note 9; see also FINAL DECISION, *supra* note 208, at 14 ("This Final Decision will be enforceable by the Compact Council and any Party (as defined under Section 1.2 of the Compact) under the Compact pursuant to Compact Section 7.3.2.a.").

227. See Don Behm, *Milwaukee Wrestles Waukesha Water Deal away from Oak Creek*, MILWAUKEE J. SENTINEL (Oct. 31, 2017, 2:01 PM), <https://www.jsonline.com/story/news/local/milwaukee/2017/10/30/milwaukee-wrestles-waukesha-water-deal-away-oak-creek/803230001/> [<https://perma.cc/JVK5-W4A8>] (noting that the original plan was for Waukesha to build the pipeline from Lake Michigan to Oak Creek, Wisconsin, but that plan has changed largely due to cost savings).

228. See Garcia & Schutz, *supra* note 15 ("Per the rules of the compact, Waukesha would have to return the same amount of water it takes from Lake Michigan back into the lake.").

229. See FINAL DECISION, *supra* note 208, at 13 ("The Applicant must return to the Root River, a Lake Michigan tributary, a daily quantity of treated wastewater equivalent to or in excess of the previous calendar year's average daily Diversion. On any days when the total quantity of treated wastewater is insufficient to meet this

will cost around \$286.2 million and will not be completed until 2022 or 2023.²³⁰

Since the plan's approval, there has already been one challenge to the Council's decision from the Great Lakes and St. Lawrence Cities Initiative, an international group composed of over 120 mayors from United States and Canadian communities.²³¹ The group requested a formal hearing because it vehemently felt that the diversion created bad precedent; it also questioned the transparency of the overall decision-making process.²³² Because the Great Lakes Compact requires that a person be "aggrieved" to challenge Council action, the Cities Initiative and the City of Waukesha litigated the issue of standing in their briefs and at oral argument.²³³ In its arguments that it was a "[p]erson aggrieved" under the Compact's standards, the Cities Initiative claimed that it "ha[d] standing to sue on behalf of the organization itself, . . . ha[d] standing to sue on behalf of its members, and . . . has members that would have [had] standing to sue individually."²³⁴ The City of Waukesha disputed the

target, all treated wastewater must be returned to the Root River."); *see also* Kozacek, *supra* note 11 (publicizing Waukesha's plans for the Root River).

230. *See* Behm, *supra* note 227.

231. *See* Ellison, *supra* note 19 and accompanying text.

232. *See id.* According to Mayor Denis Coderre of Montreal, "To make sure the Compact and Great Lakes are not compromised in the future, this decision should be overturned[.]" *Id.* A statement from the Initiative also asserts that "[t]he only public hearing held by the Regional Body that recommended approval was held in Waukesha, which is hardly representative of the people in the Region[.]" *Id.* Additionally, the Initiative's statement alleges that "[w]hen the final decision included conditions related to some of the problems with Waukesha's application, no opportunity for comment was permitted on those changes." *Id.* *See also* Cities Initiative Reply, *supra* note 22, at 1 (noting that a "fundamental concern[]" is that "the Compact Council did not allow adequate public comment on and refined analysis of an evolving diversion" and that "[t]hese additional inputs should have been taken into account before making this benchmarking decision").

233. *See* Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, §§ 1.2, 7.3(1), 122 Stat. 3739, 3741, 3761 (2008) (containing the aggrieved person provision and defining "person"); *see also* Cities Initiative Written Statement, *supra* note 20, at 13–14 (containing the Cities Initiative's initial standing argument); Cities Initiative Supplement to Written Statement, *supra* note 22, at 3–11 (building upon the standing arguments raised in its Written Statement); Cities Initiative Reply, *supra* note 22, at 5–12 (responding to the City of Waukesha's standing arguments); City of Waukesha's Response, *supra* note 22, at 6–15 (containing the City of Waukesha's standing objections).

234. Cities Initiative Supplement to Written Statement, *supra* note 22, at 3–4. In its arguments that it had standing to sue on its own behalf as an organization, the Cities Initiative asserted that it has had to reallocate funding and resources to diversion education and projects. *See* Cities Initiative Reply, *supra* note 22, at 5–6.

Cities Initiative's arguments that it had standing to sue on its own behalf and on behalf of the group's members.²³⁵ Nonetheless, despite

"The need to allot funds to this cause prevents the Cities Initiative from carrying out other projects that would further its protection of the Great Lakes. And that is an injury that confers standing on the Cities Initiative." *Id.* at 6. In its arguments that it had standing to sue on behalf of its members, the Cities Initiative claimed that it satisfied the requirements for organizational standing. *Id.* It stated that "[t]he interests at stake in the Compact Council's Final Decision on the Waukesha Diversion are central to the purpose of the Cities Initiative." Cities Initiative Supplement to Written Statement, *supra* note 22, at 6. Additionally, "the Cities Initiative can pursue this challenge and its requested remedy independently of its members." *Id.* And finally, "[t]he remedy the Cities Initiative requests consists solely of actions to be taken by the Compact Council, and therefore does not require any individual member participation." *Id.* To support its third argument—that its members would have standing to sue individually—the Cities Initiative went through the traditional Article III elements of injury, causation, and redressability. *See id.* at 7-11. The group focused on injuries to the members through a weakening of the Compact's legal protections and also specifically on the Mayor of Racine, John T. Dickert, and his position as a representative of the City of Racine in the Cities Initiative. *See* Cities Initiative Reply, *supra* note 22, at 8-12. "[T]he injury the mayors and their cities have suffered is a weakening of the protective force of the Compact itself, and of all the protections the Compact, which has been enacted into federal law, is supposed to provide . . ." *Id.* at 8.

Mayor Dickert has asserted at least two interests that are harmed by the Waukesha diversion, and therefore sufficient to confer standing. First, . . . the City of Racine invested considerable sums of money in making the Root River an attractive waterway for public recreation, and the North Beach and Racine Harbor are both key pieces of the city's economy. The Waukesha diversion will damage those interests, thereby impairing Mayor Dickert's interest in the city's financial health. Second, . . . one of [Mayor Dickert's] obligations as Mayor is providing fresh water to the electorate and maintaining sustainable waterways.

Id. at 10 (citations omitted). Addressing causation and redressability, the Cities Initiative asserted that all injuries will be directly because of the Council's decision approving the diversion, and reconsideration of the decision would remedy the injuries alleged. *See* Cities Initiative Supplement to Written Statement, *supra* note 22, at 10-11.

235. *See* City of Waukesha's Response, *supra* note 22, at 6. ("While the Cities Initiative is a 'person' for purposes of requesting a hearing under the Compact, Waukesha disputes that the Cities Initiative has established that is 'aggrieved' within the meaning of Section 7.3 of the Compact such that it has standing to obtain a hearing and to seek judicial review."); *see also In re City of Waukesha*, *supra* note 23, at 9 (summarizing how Waukesha "disputes that any changes in use of programmatic resources or alleged effects from the return flow constitute a particularized, concrete injury sufficient to establish that [the Cities Initiative] is aggrieved[,] how "Waukesha questions the authority of the mayors participating in the Cities Initiative to act on behalf of their respective cities to challenge the Final Decision absent express approval from the cities' governing

its belief that the group lacked the ability to request a hearing and seek judicial review under the Compact, the City of Waukesha “strongly urge[d]” the Council to proceed to the merits of the Cities Initiative’s hearing request;²³⁶ it ultimately did, leaving the question of standing under the Compact unanswered.²³⁷

In another unanimous decision, the Compact Council rejected the Cities Initiative’s challenge.²³⁸ Finding that the Cities Initiative did not meet its burden to have the Compact Council reopen or modify its decision approving the Waukesha Diversion, the Compact Council then declared that the group had exhausted all administrative remedies available.²³⁹ The Cities Initiative could have kept the challenge alive and sought judicial review within the permitted ninety-day window the Compact prescribes;²⁴⁰ however, the parties reached a settlement containing an agreement to collaborate during the review of future diversion applications and to establish an advisory committee to draft new procedures and guidelines to assist in evaluating them.²⁴¹ Because of the Cities Initiative’s decision to

bodies[.]” and how “Waukesha also disagrees that Racine will suffer any injury from the discharge of return flow to the Root River”).

236. City of Waukesha’s Response, *supra* note 22, at 7, 15 (“In sum, the Cities Initiative has failed to establish the prerequisites for standing, either on its own behalf or on behalf of its members. Nonetheless, Waukesha urges the Council to address the Cities Initiative’s other claims on their merits, so that a reviewing court could reach all of the issues raised in the event it disagrees with Waukesha’s position on standing.”).

237. See *In re City of Waukesha*, *supra* note 23, at 1-2 (“This Opinion . . . explains that the Compact Council reached the merits of the Cities Initiative’s arguments notwithstanding uncertainty that the Cities Initiative has shown itself to be a ‘person aggrieved’ by the Final Decision and thereby entitled to a hearing under Section 7.3.1 of the Compact.”).

238. See *id.* at 8 (noting how “the Compact Council unanimously decided that the Cities Initiative has not met its burden”).

239. See *id.* at 51-52 (“As of May 4, 2017 (the date of the issuance of this opinion), all administrative remedies available to the Cities Initiative relating to the Compact Council’s Final Decision dated June 21, 2016 In the Matter of the Application by the City of Waukesha, Wisconsin for a Diversion of Great Lakes Water from Lake Michigan and an Exception to Allow the Diversion (No. 2016-1), are hereby exhausted.”).

240. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, §§ 1.2, 7.3(1), 122 Stat. 3739, 3741, 3761 (2008) (asserting the judicial review must be sought within ninety days).

241. See Press Release, Great Lakes and St. Lawrence Cities Initiative, Mayors and Governors Reach Agreement to Improve Water Diversion Application Process (Aug. 2, 2017), <https://glslcities.org/water-diversion-application-agreement/> [<https://perma.cc/QKX7-27LM>]; see also Wilson, *supra* note 25 (“In exchange for not pursuing a legal remedy, representatives for the governors, known as the

drop its challenge and forgo judicial review, standing under the Great Lakes Compact's aggrieved person provision remains without precedent.²⁴²

Overall, the Waukesha Diversion Approval is historic for a number of reasons.²⁴³ Given the gravity of its impact, it is unsurprising that one challenge to the decision, though settled, already occurred.²⁴⁴ If new challenges formulate, the Compact's aggrieved person provision heightens in importance and will play a major role as other persons potentially exhaust all other remedies and attempt to seek judicial review.²⁴⁵

IV. THE GREAT LAKES COMPACT AND THE WAUKESHA DIVERSION: MAKING THE CASE FOR A BROAD INTERPRETATION OF THE "AGGRIEVED PERSON" STANDARD IN LIGHT OF PUBLIC TRUST PRINCIPLES

It is no secret that the Great Lakes, constituting one-fifth of the world's water supply, are of unrivaled importance and value.²⁴⁶ Their precious contents are a highly coveted treasure, and desires for diversions from those outside the Great Lakes Basin are a logical outgrowth of this notion.²⁴⁷ Nonetheless, the progressive history of Great Lakes management based on public trust principles illustrates an evolving commitment against this practice with leaders expressly recognizing the pervasive dangers diversions pose to the waters and the ecosystem as a whole.²⁴⁸ Thus, the Compact Council's decision to approve the City of Waukesha's request to tap into Lake Michigan is monumentally significant, and the contentious nature of the entire

Compact Council, agreed to establish and work with an advisory committee to update procedures on how to handle future water diversion requests.").

242. See *In re City of Waukesha*, *supra* note 23, at 10 (acknowledging that the Council did not "fully resolv[e] whether the Cities Initiative is a '[p]erson aggrieved' and thereby entitled to a hearing").

243. See Matheny, *supra* note 10 (discussing the historic nature of the decision).

244. See Ellison, *supra* note 19.

245. See § 7.3, 122 Stat. at 3761.

246. See *Great Lakes Facts and Figures*, *supra* note 2 and accompanying text.

247. See Olson, *supra* note 6, at 33 (discussing the correlation between the increasing global water demand and pressure on the Great Lakes as a source of fresh water).

248. See *supra* Part I (discussing the entrenchment of the public trust doctrine in the Great Lakes states and charting the history of key developments in Great Lakes governance); see also *supra* note 148 and accompanying text.

process made a challenge like the Cities Initiative's inevitable and leaves open a possibility for others in the future.²⁴⁹

Consequently, a critical hurdle for those embarking on judicial review is establishing standing.²⁵⁰ Pursuant to the Great Lakes Compact, any aggrieved person can seek judicial review upon exhausting all other administrative remedies.²⁵¹ Because the Compact does not explicitly define the meaning of "aggrieved" within its framework, a question of interpretation exists.²⁵² Given the immeasurable value of the Great Lakes and their status as public trust waters, the potential gravity of impact the Waukesha Diversion may have on them, and the possible ramifications for future cases beyond Waukesha, the Council's decision deserves the utmost scrutiny.²⁵³ Therefore, the Compact Council and reviewing courts should interpret the aggrieved person standard broadly in light of public trust principles so as not to preclude meaningful review in this unique context and to most effectively comport with the Compact's overarching purpose—safeguarding the waters in perpetuity.²⁵⁴

A. The Great Lakes: An Indispensable Resource Warranting the Utmost Protection

Water constitutes the most fundamental and sustaining human need.²⁵⁵ All life forms depend upon it, and its presence is absolutely

249. See Matheny, *supra* note 10 (noting how the decision to approve the Waukesha Diversion "mark[ed] the first test case of the Great Lakes Compact"); see also *supra* Section III.B-C (discussing the controversy surrounding the decision, the primary arguments proponents and opponents presented, and the Cities Initiative's challenge).

250. See STONE, *supra* note 26, at 35 (noting that standing is a justiciability filter that a litigant must satisfy).

251. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 7.3(1), 122 Stat. 3739, 3761 (2008) ("After exhaustion of such administrative remedies, . . . any aggrieved Person shall have the right to judicial review of a Council action.").

252. See *id.* § 7.3, 122 Stat. at 3761–62 (revealing that the word "aggrieved" is not defined in any provision of the Enforcement section of the Great Lakes Compact); see also *id.* § 1.2, 122 Stat. at 3739–42 (illustrating that the word "aggrieved" does not appear in the Definitions section of the Great Lakes Compact).

253. See *infra* Section IV.A-B (discussing the immense value of the Great Lakes, highlighting the precedential nature of the Waukesha decision, and analyzing why scrutiny is pivotal to protect the waters in perpetuity).

254. See *infra* Section IV.B (applying the standing principles to Waukesha); see also § 1.3(1)(f), 122 Stat. at 3742–43.

255. See SHARING WATER IN TIMES OF SCARCITY, *supra* note 2 and accompanying text.

vital to the existence of the planet.²⁵⁶ Containing six quadrillion gallons of water and constituting one-fifth of the world's fresh surface water supply, the Great Lakes are a critical component of the overall global water source.²⁵⁷ Moreover, the Great Lakes represent 84% of all fresh water within North America, and they correspondingly hold approximately 95% of the United States' available supply.²⁵⁸ Given their immense presence, people all across the Great Lakes Basin depend upon them for a variety of purposes;²⁵⁹ nevertheless, their value, especially as a drinking water source, makes them "crown jewels" and worthy of stringent protection as part of the public trust corpus so that they are not diminished for generations to come.²⁶⁰ Recognition of this principle and the influence that the public trust doctrine should have on Great Lakes management decisions is pivotal as these bodies of water continually face a multitude of threats growing in intensity, especially as the effects of climate change persist.²⁶¹

Diversions represent just one of these issues facing the Great Lakes.²⁶² While appreciation for the dangers diversions pose has been a common and progressive theme throughout the history of Great Lakes governance, it is quickly rising to the forefront as one of the

256. See *id.*

257. See *Great Lakes Facts and Figures*, *supra* note 2 and accompanying text.

258. See *id.*

259. See, e.g., Hall & Houston, *supra* note 5, at 723 (asserting that twenty-three million people rely upon the Great Lakes for drinking water); Olson, *supra* note 96, at 1121 (acknowledging that the people within the Great Lakes region rely upon the waters for domestic, industrial, and navigational purposes); see also *supra* Section I.A (illustrating how the public trust doctrine, which is firmly rooted and recognized in each of the eight Great Lakes states, exists to protect the public's use rights).

260. See BARLOW, *supra* note 1, at 67 (noting how the Great Lakes should be managed as a trust for the benefit of the public good); Moll et al., *supra* note 3, at 3 (calling the Great Lakes the "crown jewels" of North America's freshwater system); Olson, *supra* note 2, at 151 (asserting that the Great Lakes states all recognize the public trust doctrine's applicability to the Great Lakes).

261. See *supra* Subsection I.A.2 (describing how the public trust doctrine is well-recognized in each of the Great Lakes states); see also Hall & Houston, *supra* note 5, at 725 ("The Great Lakes are beset by pollution from industry, afflicted by eutrophication due to agricultural fertilizers, invaded repeatedly by nonnative species, threatened by climate change, and eyed by more arid regions for diversions to ease water shortages in other areas of the country.").

262. See Hall & Houston, *supra* note 5, at 725.

chief concerns among Great Lakes advocates.²⁶³ As clean, drinkable fresh water grows increasingly scarce amongst varying parts of the country because of pollution and drought-induced water shortages, the pressure to tap into the Great Lakes and rely upon them as an alternative drinking water source intensifies.²⁶⁴ Consequently, those empowered with the responsibility to protect and serve as guardians of the Great Lakes, including both the Compact Council and courts reviewing challenges to Council action, should be perpetually cognizant of this dilemma to most effectively comport with their public trust obligations and the Compact's overall purpose.²⁶⁵ Further, the interconnected nature of the Great Lakes, the longstanding acknowledgement of the importance of basin-wide management, and public trust principles need to serve as guiding considerations, especially when evaluating whether a party seeking judicial review has standing as an aggrieved person under the Compact.²⁶⁶

B. Standing and Challenges to the Waukesha Diversion Approval: A Broad-Based Argument

Standing is a foundational prerequisite for judicial review.²⁶⁷ It is an unavoidable requirement that a party seeking to bring a cause of action in court must satisfy.²⁶⁸ As prior case law declares, the standing analysis is context dependent based upon the individual

263. See *supra* Part I. Each of the key developments in the history of Great Lakes management addressed the problem of diversions to varying degrees. See *supra* Part I. From the ratification of the Boundary Waters Treaty in 1909 to the enactment of the Great Lakes Compact in 2008, decision makers' commitment against diversions has progressively strengthened. See *supra* Part I.

264. See Olson, *supra* note 6, at 33 (noting how the global water demand is increasing and so is the desire to access the Great Lakes).

265. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 1.3(2)(b), (f), 122 Stat. 3739, 3743 (2008) (professing that among the several purposes of the Great Lakes Compact include “remov[ing] causes of present and future controversies” and “prevent[ing] significant adverse impacts of [w]ithdrawals and losses on the Basin’s ecosystems and watersheds”); see also Kilbert, *supra* note 50, at 6 (explaining the obligations that the public trust doctrine imposes).

266. See *supra* Subsection I.B.2 (discussing the aggrieved person provision in the Great Lakes Compact and how “aggrieved” is undefined).

267. See STONE, *supra* note 26, at 35 (discussing standing as a requirement to “get through the courthouse door”).

268. See *id.*

circumstances pertaining to the particular case at hand.²⁶⁹ Consequently, while the Supreme Court has delineated the traditional elements of standing that a challenging party must demonstrate,²⁷⁰ there is flexibility in how courts elect to interpret them.²⁷¹ This flexibility will prove to be critical as any new challenges to the Compact Council's decision approving the City of Waukesha's application to divert 8.2 million gallons of water per day from Lake Michigan arise—or in challenges to new diversions in the future.²⁷² Given the treasured value of the Great Lakes and the precedential nature of the Compact Council's decision, reviewing courts should appropriately exercise their discretion, tread with caution, and interpret the aggrieved person standard outlined in the Compact's dispute resolution provision broadly; this interpretation should be informed by the public trust principles that have historically influenced the waters' management.²⁷³

Parties seeking to challenge the Compact Council's decision approving the Waukesha Diversion will have to achieve both constitutional and statutory standing to effectively attain judicial review upon exhaustion of all other administrative remedies that the Compact provides.²⁷⁴ Consequently, those opposed to the action will first have to show that they have suffered a concrete and particularized "injury in fact" that is "actual or imminent" instead of

269. See *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 615 (2d Cir. 1965) ("[T]he law of standing is a 'complicated specialty of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations.'" (quoting *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 156 (1953))).

270. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (noting that standing requires an "irreducible constitutional minimum" of three elements).

271. See *STONE*, *supra* note 26, at 49 ("The standards for standing are not the same in each setting.").

272. See *Kozacek*, *supra* note 11 (establishing that the final approved amount for the diversion was 8.2 million gallons per day); see also Press Release, *supra* note 241 (discussing the Great Lakes and St. Lawrence Cities Initiative's settlement with the Compact Council).

273. See *supra* Section IV.A (addressing the value of the Great Lakes); see also *Kozacek*, *supra* note 11 (acknowledging that the Waukesha Diversion Approval is of "landmark" significance as the first of its kind under the Great Lakes Compact).

274. See *supra* Part II (discussing how the legislature can further circumscribe the standing threshold in a statute); see also Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 7.3(1), 122 Stat. 3739, 3761 (2008) ("After exhaustion of such administrative remedies, . . . any aggrieved Person shall have the right to judicial review of a Council action.").

“conjectural” or “hypothetical.”²⁷⁵ In the context of Waukesha, reviewing courts should willingly make this finding in favor of any future challenger because, as the Supreme Court dictated in *Sierra Club v. Morton*, aesthetic and environmental interests are legally cognizable injuries for the purposes of establishing constitutional standing.²⁷⁶ Therefore, if a challenger is capable of showing that he has been injured in some way based on these types of interests, then this first prerequisite should not serve as a rigid barrier.²⁷⁷ Finding the existence of injury in the context of the Waukesha Diversion also aligns with the public’s vested right in Great Lakes protection, which every Great Lakes state recognizes in its legal framework.²⁷⁸ Given the immeasurable importance of the Great Lakes as the source of 95% of the available fresh water in the United States and as a resource upon which so many other economic, social, and cultural activities depend, this interpretation of the injury element to standing is demonstrably prudent.²⁷⁹

Nonetheless, the strongest argument against the existence of injury in the context of Waukesha is that any purported injury is too speculative since the pipeline necessary for the diversion to occur will not be completed until at least 2022.²⁸⁰ From this perspective, reviewing courts should find that a challenging party has not yet suffered any detriment because the impacts of the diversion will remain unknown until Waukesha actually begins pumping the water.²⁸¹ While this assertion has strong merit, its practical effects are

275. *Lujan*, 504 U.S. at 560 (“First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest which is (a) concrete and particularized and (b) ‘actual or imminent, not “conjectural” or “hypothetical.”’”) (citations omitted).

276. *See Sierra Club v. Morton*, 405 U.S. 727, 738 (1972) (recognizing that aesthetic, recreational, conservational, and economic values are all viable interests capable of suffering an injury for standing purposes); *see also* May, *supra* note 164 and accompanying text.

277. *See Sierra Club*, 405 U.S. at 738.

278. *See supra* Subsection I.A.2 (outlining how the Great Lakes states have integrated the public trust doctrine and its corresponding principles into their constitutional provisions, statutes, and jurisprudence).

279. *See Great Lakes Facts and Figures*, *supra* note 2 (citing how much of the United States’ water supply the Great Lakes contain); *see also* Hall & Houston, *supra* note 5, at 723 (describing the enormity of the Great Lakes); *id.* at 725 (noting that there are a “diversity of values, interests, and priorities at play” in the Great Lakes Basin).

280. *See Behm*, *supra* note 227.

281. *See* FINAL DECISION, *supra* note 208, at 13 (outlining the specific reporting requirements with which Waukesha must comply).

incompatible with the overarching purpose of the Compact and the urgent need to protect the Great Lakes in perpetuity in accordance with public trust principles.²⁸² If concerns about speculation were to triumph, then irreparable harm could occur to the waters simply based on a technicality.²⁸³ Therefore, reviewing courts should consciously recognize the existence of injury in any future challenges to Waukesha due to the unique position of the Great Lakes in the ecosystem and in society as a whole.²⁸⁴

Causation is the next constitutional standing prerequisite that a party seeking to challenge the Waukesha Diversion approval would have to satisfactorily establish.²⁸⁵ In this context, showing causation would mean the Compact Council's decision is causally connected or "fairly . . . trace[able]" to the party's alleged injury.²⁸⁶ This element presents a seemingly challenging hurdle because the Great Lakes face a multitude of threats on a continuing basis.²⁸⁷ As a result, the primary concern here would be the ability to effectively demonstrate that the alleged injury was not caused by some other unknown factor like a preexisting diversion, such as that in Chicago.²⁸⁸ However, given the unprecedented nature of the Waukesha Diversion's approval and the fact that the injury must simply be fairly traceable to the Compact Council's conduct, causation, like injury, should not prohibit judicial review of the decision.²⁸⁹

282. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, § 1.3(1)(a), 122 Stat. 3739, 3742 (2008) ("The Waters of the Basin are precious public natural resources shared and held in trust by the States.").

283. See *id.* § 1.3(1)(d), 122 Stat. at 3742 ("Future Diversions . . . of Basin Water resources have the potential to significantly impact the environment, economy and welfare of the Great Lakes–St. Lawrence River region.").

284. See Moll et al., *supra* note 3, at 3 (emphasizing the Great Lakes' vital position within North America's freshwater system).

285. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) ("Second, there must be a causal connection between the injury and the conduct complained of.").

286. See *id.* at 560-61 (noting that "the injury has to be 'fairly . . . trace[able]' to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court") (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)).

287. See Hall & Houston, *supra* note 5, at 725 (asserting that aside from diversions, the Great Lakes face problems ranging from pollution to eutrophication, invasive species, and climate change); see also Olson, *supra* note 2, at 142-43 (expounding upon the threats facing the Great Lakes).

288. See Hall & Houston, *supra* note 5, at 756 (noting that the Chicago diversion presently involves the pumping of water at 3,200 cubic feet per second).

289. See *Lujan*, 504 U.S. at 560-61 (implying that causation does not require absolute certainty).

The final constitutional element that a party challenging the approval of the Waukesha Diversion would have to show is redressability.²⁹⁰ In this context, demonstrating redressability would mean that a favorable decision from the reviewing court would likely provide an adequate remedy to the injury alleged.²⁹¹ Because of the monumental significance of the Waukesha Diversion's approval, a court decision enjoining the diversion after finding that the Compact Council acted improperly would remedy an alleged injury resulting from it.²⁹² Moreover, because the chance of redressability must be one of probable likelihood rather than absolute certainty, the evidence in favor of finding its existence is even stronger.²⁹³ In sum, when conducting the basic constitutional standing analysis, reviewing courts should appreciate how the magnitude of the Great Lakes as a resource pushes the traditional boundaries of standing and integrate the public trust principles so deeply engrained in their management framework to find that the three elements of injury, causation, and redressability exist.²⁹⁴

A subsidiary route worth briefly mentioning that may be available to those opposing the Compact Council's decision is to raise a procedural injury claim.²⁹⁵ An allegation of this nature would arise if the Council failed to comply with a statutorily mandated procedural requirement.²⁹⁶ The key here is that if a procedural injury occurred, the challenging party would only have to show injury and

290. See *id.* at 561 (asserting that the third standing requirement is redressability).

291. See *id.* ("Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'") (quoting *Simon*, 426 U.S. at 38, 43).

292. See Ellison, *supra* note 19 (noting that opponents to the Waukesha Diversion Approval, like Mayor Denis Coderre of Montreal, believe that overturning the decision will "make sure the Compact and Great Lakes are not compromised in the future").

293. See *supra* note 290 and accompanying text.

294. See *supra* Section IV.A (describing the importance of the Great Lakes); see also *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 615 (2d Cir. 1965) (affirming that the standing analysis is context dependent and should take the unique circumstances of the situation at hand into account); Olson, *supra* note 2, at 151 (noting how public trust principles have "remained constant and flourished over time in . . . all of the Great Lakes states").

295. See *supra* Section II.A (discussing procedural injuries as an alternative route to the traditional standing process).

296. See STONE, *supra* note 26, at 44 (discussing how this type of injury occurs upon the defendant's failure to follow a requisite procedure).

not causation or redressability for constitutional standing purposes.²⁹⁷ Thus, the standing threshold is a lower obstacle to overcome.²⁹⁸ The Great Lakes and St. Lawrence Cities Initiative made allegations equivalent to procedural injuries, criticizing the approval process's lack of transparency.²⁹⁹ For instance, the Initiative asserted that the only public hearing was conducted in the City of Waukesha, a location that is clearly unrepresentative of the entire population composing the Great Lakes region.³⁰⁰ Further, it cited a lack of opportunity to comment on certain conditions that were included in the Final Decision addressing some of the issues pertaining to Waukesha's application.³⁰¹ If these required procedures were violated, then a group like the Cities Initiative should have constitutional standing to obtain judicial review.³⁰² However, because the Cities Initiative declined to seek judicial review of the Compact Council's decision rejecting its procedural claims through its settlement agreement, no further litigation on this facet as it applies to standing occurred; another challenger could theoretically still attempt a procedural injury claim.³⁰³

Nonetheless, even when a party meets all the constitutional standing prerequisites, the issue of statutory standing still remains because laws, like the Great Lakes Compact, can declare that a person must be aggrieved to initiate a cause of action.³⁰⁴ When the

297. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

298. See *STONE*, *supra* note 26, at 44 (asserting that Scalia implied this lower threshold with procedural injuries when he wrote the *Lujan* opinion).

299. See *Ellison*, *supra* note 19; see also *Cities Initiative Reply*, *supra* note 22, at 1 (stating the Initiative's concern regarding a lack of adequate public comment).

300. See *Ellison*, *supra* note 19. The Initiative's critique of the public hearing process amounts to a procedural injury claim since public participation is a mandated requirement in the Great Lakes Compact. See also *Great Lakes-St. Lawrence River Basin Water Resources Compact*, Pub. L. No. 110-342, § 6.2, 122 Stat. 3739, 3760 (2008).

301. See *Ellison*, *supra* note 19 (describing how the Initiative's complaint includes the lack of opportunity to comment on changes that appeared in the Final Decision).

302. See *STONE*, *supra* note 26, at 44. Standing would be established because with procedural injuries, "[t]he 'injury' is complete when the right to the procedure is violated." *Id.*

303. See *Press Release*, *supra* note 241; see also *Wilson*, *supra* note 25.

304. See § 7.3(1), 122 Stat. at 3761 (establishing that the Compact requires a person to be "aggrieved" to seek judicial review).

statute neglects to explicitly define who qualifies as aggrieved under its framework, courts subsequently apply the zone-of-interest test to see if the challenging party can be classified as such, and as case law demonstrates, interpretations oscillate between narrow and broad.³⁰⁵ Moreover, under this test, statutory intent is key because the sole focus is whether the challenging party's interests are related to and consistent with the statute's underlying purpose.³⁰⁶ The zone-of-interest test applies to the Great Lakes Compact because "aggrieved" is undefined within the framework of the document.³⁰⁷ However, since the Compact Council addressed the merits of the Cities Initiative's challenge without deciding whether the Cities Initiative had standing, its written opinion provides no guidance, leaving the issue unresolved and open to future debate.³⁰⁸ Accordingly, how reviewing courts apply the test and elect to interpret the aggrieved person standard in any future challenges to the Waukesha Diversion will be critical.³⁰⁹ Because of the precedential power of the Waukesha Diversion approval, the Great Lakes' undeniable value, and the Basin's interconnected nature, it is imperative that courts recognize a wide zone of interest and interpret aggrieved broadly in light of the public trust principles entrenched in the Compact's framework and the history of Great Lakes governance.³¹⁰

As the evolution of Great Lakes governance history indicates, the drafting and ratification of the Great Lakes Compact signified the

305. See *supra* note 176 and accompanying text. Compare *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (interpreting "aggrieved" narrowly and holding that the Sierra Club did not have standing), with *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965) (interpreting "aggrieved" broadly and holding that a group of conservationist nonprofits and three towns did have standing).

306. See *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) (establishing that a person cannot be aggrieved if his "interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit").

307. See § 1.2, 122 Stat. at 3739-42 (illustrating that the word "aggrieved" does not appear in the Compact's definition section).

308. See *supra* note 237 and accompanying text.

309. See Matheny, *supra* note 10 (highlighting that the Waukesha Diversion Application is "the first test case of the Great Lakes Compact").

310. See *id.* (discussing the potentially dangerous precedent that those against the diversion fear the Council's decision sets); Garcia & Schutz, *supra* note 15 (reiterating the fact that many are weary of the impact the Waukesha Diversion Approval may have in the future); see also § 1.3(1)(b), 122 Stat. at 3742 ("The Waters of the Basin are interconnected and part of a single hydrologic system."); *id.* § 1.3(1)(a), (f), 122 Stat. at 3742-43 (incorporating public trust principles into the Compact); *supra* Part IV.A (describing the indispensable value of the Great Lakes).

historic culmination of longstanding efforts to protect the Great Lakes from systemic and basin-wide threats.³¹¹ This acknowledgement that the lakes are one unified system has truly been the backbone of all continual efforts to most effectively manage this vital resource.³¹² Consequently, the Great Lakes Compact's succinct declaration that the lakes are held in trust for the people of the region encapsulates the drafters' aspirations and how they intended its provisions to protect a wide range of people and interests; it also signifies their desire to incorporate public trust principles into the Compact's framework.³¹³ Thus, when considering any future challenges to the Waukesha Diversion brought under the Compact's enforcement provision, a broad interpretation of "aggrieved," like the Second Circuit employed in *Scenic Hudson Preservation Conference v. Federal Power Commission*, most adequately, effectively, and forcefully comports with the Compact's overall purpose.³¹⁴

The situation at hand with Waukesha is analogous to that in *Scenic Hudson Preservation Conference* first and foremost because both involve a governing body's decision to permit an action capable

311. See *supra* Part I (tracing the pivotal moments in the history of Great Lakes governance from the Boundary Waters Treaty of 1909 to the eventual Great Lakes–St. Lawrence River Basin Water Resources Compact).

312. See, e.g., Scanlan, Sinykin & Krohelski, *supra* note 82, at 51 (noting that the Great Lakes Charter of 1985 recognized that the Great Lakes Basin waters are all "interconnected and part of a single hydrologic system"). This recognition of the lakes' interconnected nature manifests through the corresponding aversion to diversions appearing in the Water Resources and Development Act of 1986, the Great Lakes Charter Annex of 2001, and ultimately in the Great Lakes–St. Lawrence River Basin Water Resources Compact. See Olson, *supra* note 96, at 1121 (discussing how the Water Resources and Development Act explicitly acknowledged the impact diversions could have on the Great Lakes Basin as a whole); see also § 1.3(1)(b), 122 Stat. at 3742 (recognizing explicitly that the Great Lakes Basin waters are all interconnected); Scanlan, Sinykin & Krohelski, *supra* note 82, at 56 (noting that under the Great Lakes Charter Annex of 2001, preventing or mitigating water loss from the entire Great Lakes Basin should be the overarching goal).

313. See § 1.3(1)(a), 122 Stat. at 3742; see also *id.* § 1.3(1)(f), 122 Stat. at 3742–43.

314. See *Scenic Hudson Pres. Conference v. Fed. Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965) ("In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under § 313(b). We hold that the Federal Power Act gives petitioners a legal right to protect their special interests.").

of having a detrimental impact on an important body of water.³¹⁵ When faced with the petitioners' challenge to the Federal Power Commission's licensing decision in *Scenic Hudson Preservation Conference*, the court explicitly recognized that those who demonstrate enough of a special interest in the contested area through their activities and conduct are considered aggrieved for standing purposes and that the interpretation of aggrieved is context dependent.³¹⁶ These two principles particularly resonate with the situation in Waukesha and support the broad interpretation of "aggrieved" to include a vast array of persons throughout the Great Lakes Basin because, as the Compact declares, future diversions of Great Lakes water "have the potential to significantly impact the environment, economy[,] and welfare of the Great Lakes–St. Lawrence River region."³¹⁷ Thus, given the Compact's recognition of interconnected impacts, the Compact Council and courts reviewing challenges to the Waukesha Diversion should interpret "aggrieved" broadly to best effectuate this principle and fulfill their duty as trustees in accordance with public trust principles.³¹⁸

Rooted in support for the Waukesha Diversion, the most logical critique against interpreting "aggrieved" broadly in challenges brought under the Great Lakes Compact is judicial economy.³¹⁹ From this perspective, if reviewing courts employ an overly inclusive zone of interest, then the floodgates will open to challenges from any individual claiming to have a "special interest" in the situation.³²⁰ Accordingly, this cascading effect would in turn frustrate the

315. See Kozacek, *supra* note 11 (noting that Waukesha Diversion involves Lake Michigan and the Root River—its connecting tributary); see also *Scenic Hudson*, 354 F.2d at 611, 613 (discussing how the Federal Power Commission's licensing decision involved the Hudson River, which was "an area of unique beauty and major historical significance").

316. See *Scenic Hudson*, 354 F.2d at 616 (delineating that one may be among the class of those aggrieved if he "exhibit[s] a special interest" in a particular area through his activities and conduct); see also *id.* at 615 (holding that standing necessitates analysis based on the "specific circumstances of individual situations") (quoting *United States ex rel. Chapman v. Fed. Power Comm'n*, 345 U.S. 153, 156 (1953)).

317. § 1.3(1)(d), 122 Stat. at 3742.

318. See *id.* § 1.3(1)(f), 122 Stat. at 3742-43.

319. See *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (discussing how allowing a lawsuit based on a mere interest in the problem blurs the line between those having a bona fide interest and those who do not).

320. *Id.* (noting how a wide zone of interests negates any "objective basis upon which to disallow a suit").

function and purpose of judicial review.³²¹ Nevertheless, while this argument is strong, the situation with Waukesha—and diversions from the Great Lakes in general—necessitates special attention.³²² Given the delicate and vital resource at stake and that this was the first test case of the Great Lakes Compact, extreme caution should prevail over judicial economy, and “aggrieved” should be interpreted broadly in a manner informed by public trust principles to not unduly limit and preclude judicial scrutiny.³²³

The Waukesha Diversion Approval is just the beginning of what could be an onslaught of applications to divert Great Lakes water, especially as populations continue to rampantly increase and freshwater sources dwindle.³²⁴ Therefore, recognizing a broad zone of interest and correspondingly what it means to be aggrieved under the Great Lakes Compact will perpetuate the longstanding philosophy that has persevered throughout the history of Great Lakes governance: The lakes and the Basin as a whole are deeply interconnected and demand protection as such because they are a public trust resource.³²⁵ A critical mechanism for championing this fundamental tenet is to embrace legal challenges and close scrutiny of Compact Council action.³²⁶ Consequently, standing should not be a hindrance.³²⁷

321. See *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The redressability requirement of standing implies that an overarching function and purpose of judicial review is to rectify the injury claimed. See *id.*

322. See *supra* Part III (discussing the Waukesha Diversion Approval); see also Matheny, *supra* note 10 (noting that the Waukesha Diversion Approval signified “the first test case of the Great Lakes Compact”).

323. See *supra* Section IV.A (emphasizing the immeasurable value of the Great Lakes as a water resource and public trust asset); see also Matheny, *supra* note 10.

324. See *supra* note 218 and accompanying text.

325. See *supra* note 312 and accompanying text; see also *supra* Part I (discussing the Great Lakes as a complex resource that correspondingly necessitates intricate management for protection).

326. See Great Lakes–St. Lawrence River Basin Water Resources Compact, Pub. L. No. 110–342, § 7.3, 122 Stat. 3739, 3761 (2008) (containing the Compact’s enforcement provisions expressly enabling legal challenges and review of Council action).

327. See STONE, *supra* note 26, at 35 (noting that a party cannot “get through the courthouse door” without establishing standing).

CONCLUSION

As the first true test case of the Great Lakes–St. Lawrence River Basin Water Resources Compact, the Waukesha Diversion’s approval represents a landmark in the history of Great Lakes governance.³²⁸ Because of the controversy that plagued the whole application process, it is unsurprising that one group already attempted to challenge it.³²⁹ However, since the Compact Council bypassed a standing determination to reach the merits of the claim, it did not set any precedent to govern how the Compact’s aggrieved person provision will be interpreted in future challenges or diversion cases.³³⁰ To comport with the overall purpose of the Compact and effectively protect the Great Lakes waters and ecosystem in perpetuity, the aggrieved person provision in the enforcement section of the Compact should be interpreted broadly in light of public trust principles to grant concerned persons and organizations standing before the Compact Council and in judicial review.³³¹ Interpreting “aggrieved person” broadly is in accordance with case law that has recognized the value in environmental interests, and it will best enable members of the Compact Council to uphold their duty as trustees of the source of one-fifth of the world’s fresh surface water.³³²

328. See *supra* Part III (describing the situation surrounding the Waukesha Diversion Approval).

329. See *supra* Section III.C (chronicling the Cities Initiative’s challenge).

330. See *In re City of Waukesha*, *supra* note 23, at 1-2.

331. See *supra* Part IV.

332. See *supra* Part IV.